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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BETHLEHEM SHIPBUILDING CORPORATION, LTD. (a corporation),
Third Party Respondent and Appellant,

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation),
Respondent and Appellee,

JOSEPH GUTRADT COMPANY (a corporation),
Libelant and Appellee.

BRIEF ON BEHALF OF APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

On the 8th day of October, 1923, the Pacific Mail Steamship Company, respondent and appellee above named, hereinafter called the Pacific Mail Company, and the Bethlehem Shipbuilding Corporation, Ltd., third party respondent and appellant above named, hereinafter called the Bethlehem Corporation, entered into a contract, whereby the latter agreed, among other things, to repair the former's vessel, the Steamship "Ecuador," in the following

particulars. (Pacific Mail Company's petition, specifications of contract, items 1 to 11, inclusive. Apos. pp. 17, 18.)

"Deck Department.

1. Move ship from Pier 46 to Drydock and after work is completed move ship to Pier 44 or any other Pier designated by owner.

2. Drydock ship.

3. Furnish necessary labor to clean and paint entire bottom to deep load line. One coat of GG Anti-corrosive #1 to deep load line; one coat of GG Anti-fouling #2 to light load line and one coat of boottopping #17. Also letter draft marks ford and aft. (PMSS.-Co. to supply paint.)

4. Overhaul all clapper-valves on ship's sides, renewing all missing or broken pins and clapper-valves (about 30 valves).

5. Raise rudder and renew button under heel pintle ¾" steel disc.

6. Bore out 1 gudgeon and renew bronze bushing lined with lignum vitae. Renew zinc slabs on rudder arch as found necessary.

7. Quote price per lb. for renewing zinc plates around stern frame.

Engine Department.

8. Open up main circulating pump, clean out casing and main injection compartment and paint with 2 coats anti-fouling paint.

9. Open out all sea valves in eng. room, grind in seats, repack glands clean and paint chests and strainers and replace valves. (17)

10. Supply lights while ship is in drydock.

11. Draw tail-shaft for examination by Lloyds Surveyor, U. S. Steamboat Inspector, renew lignum vitae in lower half of bearings,

replace and couple up same complete in every detail."

The vessel was delivered to the Bethlehem Corporation on the following day, and redelivered by that corporation to the Pacific Mail Company on the 11th day of October, 1923, as provided in the contract. (Pacific Mail Company's petition, Apos. p. 20.)

On the 13th day of that month the Pacific Mail Company entered into a contract of affreightment with the Joseph Gutradt Company, the libelant and appellee herein, under the terms of which the Pacific Mail Company acknowledged receipt of 1334 cases of salt-water soap in apparent good order and condition, and agreed with the Joseph Gutradt Company, in consideration of the freight charges to be paid to the Pacific Mail Company, to transport said merchandise to Norfolk, Va., and to deliver it there in like apparent good order and condition. (Pacific Mail Company's answer to libel. Apos. pp. 9, 10. Libelant's Exhibit No. 5.)

The remaining facts will be stated with proper references in later portions of this brief. Generally, they are as follows:

On the redelivery of the vessel to the Pacific Mail Company her cargo holds were inspected by the first officer and other deck officers of the vessel, and the loading of cargo was then started. While cargo was being stowed in the 'tween-deck of No. 2 hold the stevedores noticed that the bonnet was off of

the clapper-valve located in the forward part of the 'tween-deck on the port side. This was called to the attention of the first officer, who had the chief engineer bolt the bonnet back in its place. An attempt was made by both of those officers to examine the two other clapper-valves in the 'tween-deck of No. 2 hold, but they were unable to do so by reason of the fact that the 'tween-deck was partially filled with cargo. No attempt was made, however, to remove any part of the cargo in order to get at the other two valves. An inspection was thereupon made of the other holds by the officers of the vessel, and such clapper-valves as were not covered by cargo were examined and found in order.

The vessel started on her voyage from San Francisco at 10:20 P. M., on the night of October 13, 1923, and on the following night at 10 o'clock it was found that the water in the port bilge of No. 2 hold was within a few inches of the cargo in that hold; there being some thirty-five inches of water in the port bilge. The main line engine pump was put on that bilge and at about 11:00 it sucked air indicating that the bilge was dry. At midnight the sounding previously ordered by the master showed the bilge had filled again to the extent of twenty-five inches. There is testimony in the record that other soundings were taken after midnight, and that at 6 o'clock of the following morning a carefully checked sounding showed that there were about twenty feet of water in No. 2 hold.

On arrival of the vessel at the port of Wilmington, the first port of call, later in the morning it was found that the libelant's cargo, together with other cargo stowed in No. 2 and No. 3 holds of the vessel, had been damaged by sea water. On removal of the cargo it was found that at least some of the sea water then in the two holds entered through a clapper-valve in the starboard side aft of the 'tween-deck of No. 2 hold, on which clapper-valve the Bethlehem Corporation had failed to replace a bonnet. The Pacific Mail Company claims that such failure caused the breach of the Pacific Mail Company's contract with the libelant to deliver the latter's cargo in good order and condition. (Pacific Mail Company's petition, Apos. pp. 21, 22, 23.) Hence, the claim that the Bethlehem Corporation is liable to it for the damage for which the Pacific Mail Company is liable to libelant for its breach of the contract of affreightment. (Pacific Mail Company's petition, p. 24.) And the District Court erroneously so held.

ARGUMENT.

1. The Damages Claimed For Injuries to Cargo Were Special Damages, and Not Recoverable Under the Evidence in this Case.

The Pacific Mail Company alleges in its petition (Apos. p. 15) that it entered into a contract with the Bethlehem Corporation for the repair and overhauling of the S. S. "Ecuador" and the terms of

the contract are then set out verbatim. It further alleges (Apos. p. 20) that the Bethlehem Corporation breached the contract, in that, it redelivered the vessel to the Pacific Mail Company with the bonnets on a number of clapper-valves in No. 2 hold loose, unbolted and improperly fastened. That the Pacific Mail Company relied on the agreement of the Bethlehem Corporation to perform the terms of the said contract, and that in consequence and for that reason stowed cargo in No. 2 hold, and other holds of the vessel. (Apos. pp. 21, 22.) That if the Pacific Mail Company is liable to the libelant for the damaged cargo, then the Pacific Mail Company is entitled to be reimbursed by the Bethlehem Corporation for the damages so paid by reason of the latter's breach of the contract with the Pacific Mail Company, "on account of which breach and not otherwise, the damage to the cargo of Joseph Gutradt occurred." (Apos. p. 24.)

The District Court found in its opinion, in reference to its being a suit upon a contract, and the damages caused by its breach, as follows (Apos. p. 787):

> "This is a suit in admiralty in which the libelant seeks to recover damages from the Pacific Mail Steamship Company for breach of a contract of carriage, said respondent in turn, in case it should be held liable, praying judgment against Bethlehem Shipbuilding Corporation, Ltd., on the ground that said damage, if any, arose from the breach by said shipbuilding company of a contract for repairs to the vessel engaged in such carriage.

"On October 8, 1923, the Pacific Mail Steamship Company and the Bethlehem Shipbuilding Corporation, Ltd. (hereinafter referred to respectively as the steamship company and the shipbuilding corporation), entered into a contract whereby the latter agreed to drydock the S. S. 'Ecuador,' owned by the former, to make a number of specified repairs thereto, including overhauling all clapper-valves on the ship's sides, renewing all missing and broken pins and clappers, and to return the ship ready to receive cargo.

* * * * * * *

"The contention of the third party respondent (the shipbuilding corporation) that the damages to the cargo were special in that they could not reasonably have been contemplated by the parties from a breach of the contract for repairs to the vessel, and therefore not recoverable, is untenable. General damages are those which naturally, probably and usually ensue from a failure of performance. The breach here complained of was the failure of the shipbuilding corporation to properly secure or fasten certain underwater clapper-valves. That concern knew that the vessel was largely a cargo carrier; indeed, by the terms of its contract the ship was to be returned to its owner 'ready to receive cargo.' There is no room for argument but that the reasonable and probable, if not inevitable, result of the negligence in question would be serious damage to almost any kind of merchandise stowed in the proximity of the defective valve. The breach of the contract was the efficient cause of the damage."

The burden is upon the Pacific Mail Company to prove that the damages claimed by it are legal damages, and to prove facts which would warrant re-

covery of such damages from the Bethlehem Corporation for the breach of its contract to repair the vessel.

The following testimony was offered by the Bethlehem Corporation on pages 756 and 757 of the Apostles, to which an objection was sustained.

> "Mr. LILLICK. In order that the record may have in it what we propose to prove by this witness and in order that the ruling may be made definitely, we propose to prove by this witness that he signed this bid for these repairs for the figure mentioned in it without discussing any of the clauses of the contract, or any of the clauses of the tender for bids with anyone from the Pacific Mail Steamship Company; that this witness knew nothing about the cargo the Pacific Mail Steamship Company proposed to load in the 'Ecuador,' nor upon what voyage the 'Ecuador' was to proceed when she did leave San Francisco after the repairs that were asked for were completed; that in particular the witness had no discussion with any representative of the Pacific Mail Steamship Co. in reference to the clause in the advertisement for bids with the specifications attached, 'Repairs as specified are to be completed on or before 12 o'clock noon October 12, 1923, to the entire satisfaction of our superintendent engineer or his representative'; and the note appended thereto: 'Note. In the award of contract, no specification will be given to possible earlier completion dates. All repairs that would interfere with loading of cargo must be finished and vessel available for loading berth not later than 8 A. M. October 11, 1923; vessel will be ready to go on drydock on or about 8 A. M. October 9, 1923; all work to be finished and vessel alongside Pier 44 or any other pier designated by

> the P. M. S. S. Co. and ready to load cargo by 6 o'clock A. M. October 11, 1923.'
>
> "And also that this witness knew nothing about any contracts that the Pacific Mail Steamship Company at that time had with reference to cargo to be carried upon the vessel."

It was not intended by the offer to admit that the burden was upon the Bethlehem Corporation to establish the negative of such a proposition; the sole purpose of the offer was to show good faith on our part and to give the Pacific Mail Company an opportunity to offer evidence, if possible, under which the damages claimed by it might be collected. Also, to prevent the Pacific Mail Company from arguing that the point in reference to the proper rule of damage was merely an after-thought; that it never was an issue during the trial, and consequently the Pacific Mail Company never had an opportunity to offer any evidence on that point.

In the following argument we have purposely omitted any reference to cases on damages which were tort actions (there are none squarely in point). In such actions the rule of damage is more liberal, and necessarily so, because the plaintiff is unable to protect himself by insisting upon having terms in the contract for his protection. A cause of action in tort is much more difficult to establish than a cause of action for a breach of a contract, because it is more difficult to prove negligence. But damages are more easily proved, because of the more

liberal damage rule in tort causes of action. On the other hand a breach of contract is more easily established, but the rule of damage in actions *ex-contractu* is much more strict, as will hereinafter more fully appear.

The Pacific Mail Company has not contended, and we assume that it will not, that a party may bring an action for a breach of contract, then after the trial claim that it might have brought an action for the breach of a duty imposed by law and collect damages under the *ex-dilicto* rule of damage established for actions brought originally in tort. This observation will be more clearly understood by reversing the situation and assuming that the Bethlehem Corporation, at the trial, took the position that while it breached its contract, as alleged, still it ought not to be held liable for any damages because it had not been guilty of negligence. It would not be expected of the Pacific Mail Company to admit in such a case that if the defense were proved, it would be a valid defense to its action for a breach of the contract.

The issue here is, were the damages claimed, such damages as the law will allow under the circumstances for the breach of the contract to repair the vessel. In cases *ex-contractu,* such as this, the damages allowed may be either general or special, and as different rules are applicable to those classes, it becomes necessary to determine within which classi-

fication come the damages claimed in the present case for injuries to cargo.

The distinction between general and special damages is pointed out in the case of *Howard Supply Co. v. Wells,* (C. C. A.) 176 Fed. 515, where the court says that the former are such damages as the law implies or presumes from the breach complained of, while the latter are such as have proximately resulted but do not always immediately result from the breach and will not, therefore, be implied by law, citing *Lawrence v. Porter,* (C. C. A.) 63 Fed. 62 and *Lillard v. Kentucky Distilleries,* (C. C. A.) 134 Fed. 168, 177.

In *Occidental Mining Company v. Comstock Company,* 125 Fed. 294, the court refers to general damages as those which are necessarily occasioned by the breach, and in *Dissette v. Dost,* 280 Fed. 455, special damages are described as follows:

> "If all of the acts by plaintiff complained of by defendant might have occurred without causing any injury to defendant, the damage, if any, to the defendant was special; that is, such damage as is the natural but not the necessary consequence of the act complained of." Citing *Roberts v. Graham,* 18 L. Ed. 791.

To put it differently, general damages are those certain damages which, in a given class of contract actions, it is so apparent that they were the necessary result of the breach that the law presumes, in each case falling within the given class, that those damages were suffered. It may happen, however,

in some cases, that the breach not only caused those damages which the law would imply, but also caused other damages which, although a natural result under the circumstances, do not necessarily result from such a breach. They were a possible but not a necessary result.

To illustrate: A seller fails to deliver a milling machine which the buyer had purchased to make flour at his mill. The general damage which the law implies is the difference in market value between the time when the machine should have been delivered and the contract price, because it will be presumed that in case of failure to deliver the buyer would purchase a machine in the open market from others, hence the difference paid in the market price and the contract price is the necessary result of the buyer's breach. It may happen, however, that the buyer needed the machine at the time that it should have been delivered, in order to run his mill, and while he was attempting to locate another similar machine in the market the wheat which he had on hand spoiled.

There can be no doubt that the seller's failure to deliver the machine was the cause of the loss of the wheat in the sense that such a result from a breach of that kind is well within the range of possibilities, and it was, in fact, the efficient cause in the chain of causations. But the law does not regard that failure as the proximate cause, because such damages were not the necessary consequences of the breach.

They are, then, special damages, and in order to collect them it must be proved that the seller had notice that such special damages would result from a breach *at the time that the contract was made.* As will appear in the cases cited subsequently, not only must notice of special damages be given at the time, but it must be brought home to the party, sought to be charged, in such a manner that it will appear that the liability for special damages was accepted by him *as a condition of the contract.*

Now the question arises, what damages will the law presume would necessarily result from the breach of a contract to repair a vessel? If there was a total failure on the part of the Bethlehem Corporation to make any repairs, no doubt it would be presumed that the Pacific Mail Company would take the vessel to some other shipbuilding company. It would not certainly be presumed that the Pacific Mail Company would take the vessel to sea and then attempt to charge the Bethlehem Corporation for its value if she sank by reason of her unseaworthiness. If incomplete repairs were made by the Bethlehem Corporation, still it could not be presumed that the Pacific Mail Company would send the vessel to sea, but instead would demand that the Bethlehem Corporation complete the repairs and put the vessel in the condition called for by the contract; and if the Bethlehem Corporation refused to do so, the Pacific Mail Company would have it done by another shipbuilding company and charge the

difference in cost to the Bethlehem Corporation, including, probably, the value of the use of the vessel during that time. These costs and value would be the general damages, and the authorities so hold.

In an action for the breach of a contract, in that it was not completely performed or defectively performed, the damage allowed as general damage is the cost of completing the contract or remedying the defect, if it can be done, in order to make the thing done comply with the specifications of the contract.

In *Stillwell Manufacturing Co. v. Phelps,* 130 U. S. 520, 32 L. Ed. 1035, the action was brought for payment of the balance due on a contract whereby plaintiff agreed to furnish and put in complete operation for the defendant, in his flour mill, a seventy-five barrel capacity roller. The defendant set up a counterclaim by reason of alleged defects in the manufacture and design of the machinery furnished. Defendant also claimed damages for delay and for injury to his business. The plaintiff took the position that the defendant, having received the machinery and retained it, bound himself to pay the whole contract price. The court observed, however, that this was not a sale of the machinery subject to the condition that it should be satisfactory to the purchaser, but was an agreement to furnish machinery of a certain description and quality and to set it up and put it in complete operation in defendant's mill. The court then stated the rule of

damages governing such a case as follows, on page 1037:

> "The rule of damages adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties and is in accordance with the decisions upon similar contracts. Benjamin v. Hillard, 64 U. S. 23 How. 149 (16:518); Florida R. Co. v. Smith, 88 U. S. 21 Wall. 255 (22:513); Marsh v. McPherson, 105 U. S. 709, 717 (26:1139), Cutler v. Close, 5 Car. & P. 337; Thornton v. Place, 1 Mood. & Rob. 218; Allen v. Cameron, 3 Tyrwh. 907; S. C. 1 Cromp. & M. 832."

In *Pullman Palace Car Co. v. Metropolitan Street R. Co.,* 157 U. S. 94, 39 L. Ed. 632, the action was brought by the car company to recover from the railway company a balance alleged to be due for the construction of cars. The cars, when delivered, had insufficient brakes and with those brakes they were useless to the defendant company, which attempted to rescind the agreement. The court found that the position of the defendant in regard to the brakes was well taken, but stated the rule of damage as follows, on page 639:

> "If, at trifling expense or without unreasonable exertions, the defendant could have supplied the cars in question with other brakes that were sufficient, the utmost that under all the circumstances it could claim, in reduction of the amount it agreed to pay for the cars, would be the reasonable cost of obtaining new brakes adapted for use on such cars. Stillwell

> & B. Mfg. Co. v. Phelps, 130 U. S. 520, 527 (32:1035, 1037); Miller v. Mariners Church Trustees, 7 Me. 51, 20 Am. Dec. 341; Davis v. Fish, 1 G. Greene 407, 48 Am. Dec. 387; Sedgwick, Damages (6th Ed.) 106, 107."

The plaintiff was given judgment for the contract price of the cars, less the amount it would cost defendant to replace the brakes, with other brakes sufficient for the cars.

Marsh v. McPherson, 105 U. S. 709, 26 L. Ed. 1139, on page 1142:

> "The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs; and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages. *Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. Benjamin v. Hillard,* 23 How. 149-167 (64 U. S. XVI, 518-522)."

In the case of *McCarthy v. Central Dredging Co.,* (C. C. A.) 203 Fed. 965, the respondent's scow was sunk and libelants made a contract to furnish a diver to assist respondent in raising the scow. Respondent intended to raise it by pumping, which

necessitated patching up the holes. Libelants' diver located a hole in the deck and attempted to patch it up, but failed to do so. On failing to raise the scow by pumping respondent then had her raised by jacks, and it was discovered that the hole had not been entirely covered by the diver. Respondent attempted to recover on a cross-libel the difference in cost. The court held, however, that respondent was entitled to recover only the amount which it would have cost, with perhaps some allowance for delay, to send another diver down to go over the work. That the respondent had no right after a few minutes pumping and no further investigation to abandon that method of raising the scow and hold the libelants responsible for the large expense of raising the vessel in a different way.

In *Southern Pacific Co. v. Fore River Shipbuilding Co.,* (C. C. A.) 219 Fed. 378, the action was to recover damages for an alleged breach of contract of guaranty as to the speed and coal consumption of a steamship which the defendant built for the plaintiff. It was held that plaintiff was entitled to recover under the proper rule of damages the cost of making the necessary changes in order that the vessel might comply with the contract and for the loss of the use of the vessel while they were being made.

Walsh Construction Co. v. City of Cleveland, 271 Fed. 701, on page 712:

> "The measure of damages properly to be applied is that applicable to a contract which has

been substantially performed but into the performance of which has entered defective materials or faulty workmanship, or departures from the plans and specifications. In cases of this character, two rules have been applied, depending somewhat upon the circumstances of each case. One is that the contractor is entitled to recover the contract price diminished by the difference between the value of the building to the owner in its defective condition, and its value if perfectly constructed. This rule is applied whenever the structure or building is useful to the owner in its defective condition and it is neither fair nor reasonably practicable to remedy the defects by the making of repairs. In other cases where there is a failure to complete the work, and such failure may reasonably be remedied by the expenditure of additional labor and materials, *or where the defects are of such a character that they may be fairly and reasonably remedied by the expenditure of labor and materials,* the proper rule seems to be to deduct from the contract price such sums as would be reasonably necessary to complete the work according to the contract or to make such repairs. Sutherland on Damages, Par. 699; Stillwell Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; Gleason v. Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Pelatowski v. Black, 213 Mass. 428, 100 N. E. 831. No finding, as has been said, is made by the master as to the difference in value between the reservoir in its defective condition, and the contract price, nor how much less valuable the reservoir is to the owner by reason of faulty workmanship. No evidence seems to have been offered on this proposition. The burden of proof in that situation is apparently with the owner. Filbert v. Philadelphia, 181 Pa. 530, 547, 37 Atl. 545; District of Columbia v. Clephane, 110 U. S. 212, 3 Sup. Ct. 568, 28 L. Ed. 122."

North Chicago St. Ry. Co. v. Burnham, (C. C. A.) 102 Fed. 669, page 673:

> "On any supposition, however, it is evident that the actual damage suffered by the plaintiff in error could not exceed the cost of making the changes of construction necessary to meet the requirements of the contract, and on that basis, therefore, the measure of recoupment should be determined. Benjamin v. Hillard, 23 How. 149, 167, 16 L. Ed. 518; Railroad Co. v. Smith, 21 Wall. 255, 22 L. Ed. 513; Marsh v. McPherson, 105 U. S. 709, 26 L. Ed. 1139; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; Manufacturing Co. v. Phelps, 130 U. S. 520. 9 Sup. Ct. 601, 32 L. Ed. 1030; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271; Keeler v. Herr, 157 Ill. 57, 60, 41 N. E. 750."

The important thing to notice in the foregoing cases is, that they establish that the damages implied by law in the present case would be the cost of sending a man down to the vessel at the Pacific Mail Company's pier to overhaul and make repairs to the clapper-valves in No. 2 hold, and for detention, if any, of the vessel during the time taken for such overhauling and repairs.

The damages for injury to cargo claimed in the present case are not implied by law, and they are, therefore, special damages. The Pacific Mail Company must, for that reason prove that at or prior to the consummation of the contract, the Bethlehem Corporation was notified by the Pacific Mail Company that, on completion of the repairs, it would load the vessel with certain cargo for a voyage to

east coast ports, and it is immaterial that cargo vessels are generally used for such a purpose; that the Pacific Mail Company would rely upon the Bethlehem Corporation to make the vessel seaworthy for the voyage, at least as far as the work done by the latter was concerned, and that in event the Bethlehem Corporation failed to make the vessel seaworthy, to the extent indicated, it would be expected to pay for any damage to cargo caused by such a failure, and that the Bethlehem Corporation accepted such a liability as a condition of the contract. This, it will be recalled, is the rule in the early and leading English authority of *Hadley v. Baxendale,* but it is unnecessary to establish the rule by English authorities.

In the case of *Central Trust Co. v. Clark,* (C. C. A.) 92 Fed. 295, the court, in referring to general damages (that is, those implied by law as the necessary result of the breach), as damages implied by the contract itself, holds that other damages (special damages) can only be recovered when the liability therefor was assumed as a term of the contract.

> "In the absence of proof aliunde of *knowledge by the defaulting party at the time the contract is made* of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts *in the great multitude of such cases,* and such damages only, may be recovered. Drug Co. v.

Byrd, 93 Fed. 290; Railroad Co. v. Bucki, 16 C. C. A. 42, 46, 68 Fed. 864, 868 and 30 U. S. App. 454, 460; Hadley v. Baxendale, 9 Exch. 341, 354, 356; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098; The Ceres, 19 C. C. A. 243, 72 Fed. 936, 943; Boyd v. Brown, 17 Pick. 453, 461; Ingledew v. Railroad, 7 Gray, 86, 91; Railway Co. v. Mudford Ark., 3 S. W. 814, 816; Kempner v. Cohn, 47 Ark. 519, 527, 1 S. W. 869."

In that case the seller failed to deliver a gear wheel and pinion to the buyer, a street railway company, within the time agreed. By reason of the delay the street railway company was unable to operate its cars for a certain period of time, and the delay necessitated a reduction of speed of its cars at other times. The seller was advised of these things after the making of the contract, and before the parts were delivered. The buyer sued for the damage caused thereby, but the court held that they could not be recovered because the seller had no knowledge of the special circumstances causing the damage at the time that the contract was made.

The case of *Central Trust Co. v. Clark, supra,* is also quoted with approval in *Lamon v. Speer Hardware Co.,* (C. C. A.) 193 Fed. 453, and *Northwestern Manufacturing Co. v. Great Lakes Engineering Works,* (C. C. A.) 181 Fed. 38.

In *Stebbins v. Selig,* (C. C. A.) 257 Fed. 231, the defendant breached an agreement to drill a well and install a pump for irrigation purposes upon the land of the plaintiff. By reason of such failure the

defendant's rice crop was damaged and he undertook to collect from plaintiff as damages the difference between the value of the rice actually raised, and that which would have been raised had it been irrigated. It was held that such damages were special and uncollectable in the absence of any provision in the contract indicating that such damages were contemplated by the parties. The court said:

> *"One way of testing whether the defendant contemplated this consequence is to suppose that, had defendant been asked to agree to a clause in the contract that would make him liable in the way specified, would he have assented to the same?* In our judgment there can be but one answer to this question: He would not. The foregoing principles of law are fully illustrated and sustained by the Supreme Court of the United States in Globe Refining Co. v. Landa Cotton Oil Co., supra, where the cases, English and American, are cited.
>
> This case in our opinion fully sustains the ruling of the trial court. While the complaint shows that the defendant was in the business of sinking wells for the irrigation of rice lands, *and knew that the plaintiff wanted the water to be pumped from the well in question to be used for the growing of rice,* there is no showing, in our opinion, that the plaintiff believed or contemplated, or that it was in the contemplation of either party, that if the defendant failed to perform the contract within 20 days he would be liable for the difference in value between the rice crop of the plaintiff and any rice crop raised upon any adjoining land."

In *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540, 47 L. Ed. 1171, it was held that mere

notice to a seller of some interest *or probable action of the buyer* is not enough, necessarily as a matter of the law, to charge the seller with special damages on that account if he fails to deliver the goods. The court says, on pages 1173 and 1174, in quoting from the English case of *British Columbia Sawmill Co. v. Nettleship,* L. R. 3 C. P. 490, 500:

> "I am disposed to take the narrow view that one of the two contracting parties ought not to be allowed to obtain an advantage which he has not paid for * * *. If that (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, *he would have at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him.* To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." The last words are quoted and reaffirmed by the same judge in Horne v. Midland R. Co., L. R. 7 C. P. 583; S. C., L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. Ed. par. 872."

These cases are not cited to establish the rule that, generally, loss of profits cannot be recovered as damages, but they are cited to the broad proposition that special damages cannot be recovered unless the circumstances show that the liability therefor was accepted by the defaulting party as a special condition of the contract.

The Pacific Mail Company claimed, and the District Court held, that the clause in the specifications (Apos. p. 18), "All work to be finished and vessel alongside Pier 44, or any other pier designated by owner, and ready to load cargo by 6:00 A. M. Oct. 11, 1923," operates to create such a special condition in the contract, for the repairs on the "Ecuador." It does not, even standing alone, but over and above that, this clause must be read and construed with other clauses in the documents evidencing the agreement.

In the advertisement for bids, to which the specifications were attached, are found the following clauses (Apos. pp. 15, 16):

> "Repairs as specified are to be completed on or before 12:00 noon October 12, 1923, to the entire satisfaction of our Supt. Engineer or his representative."
>
> "NOTE: In the award of contract no consideration will be given to possible earlier completion dates. All repairs that would interfere with loading of cargo must be finished and vessel available for loading berth not later than 8:00 A. M. Oct. 11, 1923."

Then follows the clause in the specifications quoted in the preceding paragraph.

The reasonable construction of these clauses is (1) that the vessel, with repairs considered as finished by the Bethlehem Corporation, should be delivered at the pier by 6:00 A. M. October 11, 1923; (2) that if directed by the Pacific Mail Company's Supt. Engineer, or his representative, to make additional repairs which would interfere with the loading of cargo, such repairs should be finished by 8:00 A. M. October 11, 1923; (3) that all other additional repairs, so directed, should be finished by 12 noon October 12, 1923. In any event, no reasonable construction could raise out of the language of these clauses an agreement by the Bethlehem Corporation to pay for damage to any cargo which might be injured in event that it breached its agreement.

In the present case there are no circumstances which tend to show that at the time the contract for repairs was made, the Pacific Mail Company even intimated to the Bethlehem Corporation that it would hold the latter liable for damage caused to cargo, and so, of course, it cannot possibly be inferred that the Bethlehem Corporation accepted such a liability as a condition of the contract.

2. The Special Damage Rule Applies to a Liability Arising Out of a Collateral Contract.

The answer of the Pacific Mail Company to the libel on file alleges as an affirmative defense, and

the bill of lading shows, that the contract under which the cargo was shipped provided that the Pacific Mail Company should only be required to exercise due diligence to make the vessel seaworthy at the time of shipment, commencement of the voyage or on the voyage, and that if such due diligence had been used neither the vessel nor the Pacific Mail Company should be held responsible for, among other things, unseaworthiness. (Apos. p. 11; Libelant's Exh. No. 5.)

Under the contract, then, there was no liability on the Pacific Mail Company's part to the shippers from the mere fact itself that the vessel was unseaworthy by reason of the defective condition of the clapper-valves, or in any other respect. But such liability does arise by reason of the failure of the Pacific Mail Company to exercise due diligence to make the vessel seaworthy at the commencement of the voyage, as provided in the contract between the Pacific Mail Company and the shippers.

Braker v. Jarvis Co., 166 Fed. 987;
Sanbern v. Wright Lighterage Co., 171 Fed. 449;
Martin v. The Southwark, 191 U. S. 1, 48 L. Ed. 65;
The Willdomino, (C. C. A.) 300 Fed. 5.

The admitted insufficiency of the inspection made by the officers of the "Ecuador", clearly establishes a breach of the contracts by the Pacific Mail Company with its shippers to exercise due diligence to

make the vessel seaworthy at the commencement of the voyage in question and its consequent liability to the shippers.

Now if the Pacific Mail Company had employed the Bethlehem Corporation to discharge the obligation of the Pacific Mail Company, under its contracts with the shippers, to exercise due diligence in making the vessel seaworthy by a proper inspection at the commencement of the voyage in question, a different case would be presented. No such allegation is made, however, in the answer of the Pacific Mail Company to the libel or in its petition to have the Bethlehem Corporation brought in as a third party. The answer alleges that in the exercise of due diligence the Pacific Mail Company contracted with the Bethlehem Corporation for the repair and overhauling of the vessel, and in particular for the overhauling and repair of all clapper-valves, and that, relying upon the agreement by the Bethlehem Corporation to put the vessel in a seaworthy condition and fit to receive cargo, it loaded and stowed cargo on the vessel. (Apos. pp. 11 and 12.) The petition alleges that the Pacific Mail Company, relying upon the performance of the contract in a workmanlike manner, and to return the vessel ready to receive cargo, and without any knowledge of the breach, stowed the cargo in No. 2 hold. (Apos. p. 22.) The allegation in reference to the vessel being returned ready to receive cargo has been disposed of in the preceding section.

These allegations in the Pacific Mail Company's answer and petition raise the question of whether, in a case where a defendant breached a contract between it and plaintiff, and it further appears that plaintiff, in relying upon defendant's performance, was induced not to perform obligations of a contract between plaintiff and a third party, is the defendant liable for damages incurred by plaintiff on the breach on such a collateral contract. This question involves an application of the rule established in the preceding section concerning the notice of damages which are not implied by law as necessarily flowing from a breach, only here such special damages arise from another contract. The principle is precisely the same, however, as the collateral contract is merely an illustration of one of the special circumstances causing damage, and under which it follows that the defendant must have had such notice as would imply that plaintiff's liability upon the collateral contract was accepted as a condition of the contract between plaintiff and defendant.

The answer to the question above propounded is, therefore, quite obvious, but, regardless of whether the question is framed as above or assumed that the Pacific Mail Company relied upon the performance of the repair contract by the Bethlehem Corporation for the performance of an obligation in a contract of affreightment between the Pacific Mail Company and a shipper, still there would be no liability on the Bethlehem Corporation for damages suffered by

the Pacific Mail Company through its breach of the latter contract, unless the Bethlehem Corporation had notice, of the kind heretofore described, of that affreightment contract at the time that it entered into the agreement with the Pacific Mail Company for the repair of the vessel.

In the following cases the special damage rule was applied to damages suffered on collateral contracts and they cannot be distinguished on the ground that the damages claimed were lost profits. Such a loss is merely one of the various kinds of special damages and they are all governed by the same rule.

Halloway v. White Company, (C. C. A.) 151 Fed. 216;

Tompkins Co. v. Monticello Co., 153 Fed. 817;

Pusey & Jones Co. v. Combined Locks Paper Co., 255 Fed. 700, affirmed 258 Fed. 989;

Mitsubishi Shoko Kaisha v. Davis, 291 Fed. 882.

As pointed out in those cases the mere fact that the Bethlehem Corporation presumably knew that the Pacific Mail Company would enter into contracts with third parties for the transportation of cargo, and that it might be damaged by the failure to replace a bonnet on a clapper-valve, is insufficient to infer that the Bethlehem Corporation agreed to assume the liability for that damage; that such a liability involves matters within the exclusive control of the Pacific Mail Company subse-

quent to the execution of the repair contract, such as the fixing of values on cargoes, the class of cargoes to be carried and the extent of the Pacific Mail Company's liability under the contract of carriage.

In the case of *Pusey Jones & Co. v. Combined Locks Paper Company (supra),* 255 Fed. 700, affirmed 258 Fed. 989, the same general ruling was made, that is:

> "unless special circumstances are shown with respect to which the parties must be deemed to have contracted."

It appears in that case that the plaintiff had purchased of the defendant a paper making machine, and defendant was to install it at a certain time. The plaintiff then entered into contracts with third parties for the sale of paper to be manufactured by the machines to be furnished by the defendant, but in the contracts with the third parties plaintiff reserved the right to begin delivery at a date later than the actual installation of the machines. As the court observed, the contracts were made contingent in their commencement upon the very circumstance of delay, which was the foundation of the action against the defendant. Under those circumstances it was held that any damages on these collateral contracts could not have been contemplated by the parties at the time that the agreement was made between plaintiff and defendant:

> "As I understand the rule, the contemplation of one of the parties is not sufficient; it must

> be a mutual and reciprocal contemplation produced by such particularity of attendant circumstances as should preclude both parties from saying that they were not, in effect, in law incorporated into the engagement."

So in the present case the contract between the Pacific Mail Company and the shipper expressly contemplated that the vessel might be unseaworthy after the repairs were made and it was provided in the contract between them that any damage resulting from unseaworthiness should not be charged against the Pacific Mail Company, provided that the latter company performed a duty to the shipper, which, under the law, it was bound to perform anyway, in seeing that the vessel was seaworthy at the commencement of the voyage.

Moreover it affirmatively appears from the evidence that the failure of the Pacific Mail Company to exercise due diligence in inspecting the vessel prior to the voyage was not due to its reliance upon the contract with the Bethlehem Corporation to repair the clapper-valves.

The District Court found (Apos. p. 791):

> "It is true that it was part of the ordinary duty of the chief engineer of the vessel before cargo was received aboard to inspect, among other things, the clapper-valves. On this occasion relying, as he had a right to do, upon the performance of its contract by the shipbuilding corporation, he made no such examination."

We take it to be a matter of common knowledge that it is the duty of the first officer of the vessel to

inspect the holds of the vessel, including the clapper-valves located therein, to ascertain if they are in a fit condition to receive the intended cargo, and Chief Engineer Murray of the "Ecuador" so testified (Apos. pp. 771, 772):

> "Q. That is in your department, of course, isn't it Mr. Murray—the clapper-valves belong to your department?
>
> A. No, sir.
>
> Q. Not under the supervision of the engineer?
>
> A. Only those that are in the engine-room department, that is, in the fire-room, bunkers and over the fuel tanks.
>
> Q. And you have nothing to do with those in Nos. 1, 2, 3, 4 or 5?
>
> A. Not directly, no, sir; those are cargo holds under the jurisdiction of the deck officers."

Of course, if it were found that any temporary repairs were needed on the mechanical parts of the clapper-valves, it would be accomplished by the engine room department.

First Officer Dowdy of the "Ecuador" testified he had never seen Mr. Murray in the cargo holds of the "Ecuador" except on occasions when the representative of the insurance company and the shipping bureau made their inspections. (Apos. p. 283.)

First Officer Dowdy, whose duty it was as a representative of the Pacific Mail Company to inspect the vessel, gave as an excuse for his negligent inspection that he relied upon the Bethlehem Corporation to put the clapper-valves in a proper con-

dition, and the same allegation is made in the Pacific Mail Company's petition. There was a total failure of proof of any such claim or allegation, however, as the first officer admitted that he had no knowledge of whether the Bethlehem Corporation agreed to repair the clapper-valves. (Apos. pp. 284, 285, 286.)

"Q. Did you see the tender or repairs that were to be made on the 'Ecuador' before the bids were asked for?

A. No, sir, I don't get any of those papers, whatsoever. I get my own report list, which is turned in, and I keep a copy for myself, and whatever is erased from there I don't know. All I know is that Mr. Montcaster tells me, 'You can't have this, you can't have that, you will get this, you will get that.' That is all I have.

Q. On your list there was nothing said about repairs to the clapper-valves?

A. No, sir.

(Stipulated that objection might be deemed to be interposed to this line of examination.)

Mr. LILLICK. Q. There was nothing on your requisition to Mr. Montcaster or to the company having to do with clapper-valves, was there?

A. Nothing whatsoever.

Q. Did you see the request or demand to the office that Mr. Murray made?

A. No, sir, I have nothing to do with that.

Q. You didn't know whether the contract provided for repairs to clapper-valves, or not, did you?

A. No, sir, I did not.

Q. You knew nothing about that at all, did you?

A. I didn't know anything at all about that.

Q. Then you did not even know that the clapper-valves were to be repaired, did you?
A. I did not.
Q. You never saw the contract that was entered into between the Bethlehem Shipbuilding Company and the Pacific Mail Steamship Company, did you?
A. No, sir."

This testimony not only fails to establish the allegation that the Pacific Mail Company relied upon the performance of the repair contract by the Bethlehem Corporation for the performance of an obligation under its contract with the shipper, or induced it not to perform such an obligation, but on the contrary affirmatively shows that the representative of the Pacific Mail Company, whose duty it was to perform that obligation, did not rely upon the repair contract with the Bethlehem Corporation. Even if he had, as previously shown, the damages resulting from an affreightment contract cannot be collected from the Bethlehem Corporation.

Lastly, it should be borne in mind that the liability, if any, of the Bethlehem Corporation is not enlarged by the fact that it is brought into this action as a third party respondent and compelled to answer the libel of the shipper. Its liability in this action is measured by its contract with the Pacific Mail Company precisely the same as if the Bethlehem Corporation and the Pacific Mail Company were the only parties to the action. (*The Lysefjord,* 262 Fed. 623.)

3. The Authorities Cited by the District Court Do Not Support Its Conclusions of Law.

After finding that the breach of the repair contract was the efficient cause of the damage the District Court ruled in its opinion (Apos. p. 790):

> "Cases supporting the view that the third party respondent is liable for the amount which the steamship company may be compelled to pay to the libelant in compensation for the damage sustained by it are: Ellerman Lines v. Smith Drydock Co., 18 Lloyds' List L. Rep. 172; The Louis Luckenbach, 207 Fed. 66; Pan-American Pet. Co. v. Robins Drydock Co., 281 Fed. 97; Mowbray v. Merriweather, 2 Q. B. 640; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232; 59 N. E. 657."

These cases are also cited to the point that the Pacific Mail Company owed no duty of inspection to the Bethlehem Corporation, and so we will consider both of those points in the discussion of the cases cited by the District Court.

Before proceeding any further, we wish to disclaim any attempt to argue that ordinarily the Pacific Mail Company owed any general duty to the Bethlehem Corporation to inspect the repairs on the vessel after they were finished, or to inspect the holds to ascertain if they were in a fit condition to receive the cargo or to take any soundings on the voyage.

In its opening brief in the trial court the Pacific Mail Company took the position that the Bethlehem Corporation had breached its contract and without

attempting to show that the damages claimed were such as might be collected in this action, argued that if the Bethlehem Corporation defended on the grounds that the damage was caused by the Pacific Mail Company's breach of duty to its shipper in failing to inspect the holds of the vessel or to take soundings, such defenses would be invalid under the active and passive negligence rule.

Our answering brief freely admitted the general rule, namely:

> "That where a defendant is guilty of a positive act of negligence and the plaintiff, if guilty only of a technical or constructive negligence, is held liable to third parties for damages directly and proximately resulting from that act, the plaintiff is entitled to be indemnified by the defendant"

as applied to cases involving breaches of duties imposed by law. Although it is clearly inapplicable to a suit for the breach of a contract, still the rule does establish that the Pacific Mail Company owed no legal duty to the Bethlehem Corporation, independently of a stipulation therefor in the contract, to inspect repairs when made, or to take soundings. But even in purely tort actions the rule would not be applied where prior to the injury the plaintiff has knowledge of facts which put him upon notice that a defect in the article furnished by the defendant would cause further damage, if used in its defective state.

Notwithstanding that the Pacific Mail Company again made as its principal point in its reply brief,

that under the rules stated the Pacific Mail Company owed no duty of inspection to the Bethlehem Corporation. That this mislead the trial court fully appears in the following excerpts from the opinion (Apos. p. 791, 793, 794):

> "While the steamship company was required in the operation of its vessel to exercise care and diligence to protect the shipper from loss, it owed no such duty to the shipbuilding corporation.
>
> * * * * * * *
>
> "As above stated, even if there were negligence here it would be at most a breach of duty to the shipper and not to the repairer of the vessel. It has been held in a similar case, where the ship owner sought to recover from the repairer the sum it had been compelled to pay on account of damage by seawater by reason of defective repairs, that the owner owed no duty to the ship's repairer to take any soundings whatever."

The court then discussed the trial court's ruling made in the English case of *Ellerman Lines v. Smith Drydock Co. (supra)* on the defense there made that the damage to the cargo was due to the negligence of the Steamship Company in not making proper soundings.

In order to prevent the possibility of such a false issue from again forming the principal basis of the decision in this action, we repeat that the Pacific Mail Company owed no duty of inspection, or to take other precautions until it had knowledge of facts sufficient to put it upon notice that water

in large quantities might enter, or was entering, through the clapper-valve in No. 2 hold.

The District Court, however, was so thoroughly saturated with the rule that there was no duty of inspection owed to the Bethlehem Corporation, by the frequency of its repetition in the Pacific Mail Company's brief, that in order to make the rule apparently bear on an issue in the case, it was compelled to hold that the Bethlehem Corporation's claim, stated in the preceding paragraph, was equivalent to no more than a claim that the Pacific Mail Company was guilty of negligence in not discovering the unsecured bonnet on the clapper-valve in question (Apos. p. 790). Then follows the above quoted statements by the court in regard to the duty of inspection not owed to the Bethlehem Corporation.

We think that it will be admitted without argument, that a general duty of precaution is one thing, and a duty of precaution in the light of particular circumstances and knowledge of certain facts, is entirely a different thing. But let us consider the cases cited by the court on this point, and also on the proper rule of damage in actions ex-contractu.

In *Ellerman Lines v. Smith Drydock Co.,* 18 Lloyd's List L. Rep. 172, (not an appellate court decision) the action was brought by the Steamship Company for defendant's breach of contract in failing to repair the drain valve on a vessel and

the damage claimed was for injury to a shipper's cargo, which the Steamship Company had been compelled to pay the shipper. The court found that the defendant did not agree to repair the valve, and so judgment was given for the defendant.

The law established by that case is that where a defendant did not agree to repair a drain pipe on a vessel it cannot be held liable for damage to cargo caused by the drain pipe being in an unrepaired condition.

To argue conversely from this ruling that if a repairer does agree to repair a drain pipe, but fails to do so, he will be liable for all damage caused thereby which the vessel's owner may be compelled to pay third parties, would be on the face of it most erroneous, illogical and fallacious. Yet that was the argument of the Pacific Mail Company in its brief to the lower court where it set out a full report of that case. If the argument is good, then in a case where a plaintiff sues on an alleged contract, for the breach of which he claims extremely speculative damages, and the court found that defendant did not enter into such an agreement, and gave judgment for the defendant, the law of that case would be that if the defendant had made such an agreement he would be liable for the extremely speculative damages caused by its breach. Absurd, of course, but that was the Pacific Mail Company's argument to the trial court on the law of the above case.

True, the court in that case says that if the facts had been different, it might have held otherwise; to which statement we should add by fair inference "provided that the damages claimed were such as are allowable under the law on contracts and special circumstances as they might appear from the evidence, if the question of damage had been an issue."

The question of the proper rule of damages for breach of contract was never raised or discussed in that case, nor was it necessary. Also the court correctly, though unnecessarily said, that the Steamship Company owed no duty to the defendant under the circumstances to take soundings, but if there had been any evidence showing that the vessel's officers had knowledge of facts sufficient to put them upon notice of the defective drain pipe, the court probably would not have made that statement.

In the *Louis Luckenbach,* 207 Fed. 66, a stevedore was injured by a breaking of a strongback on a vessel and he brought an action in tort against the charterer and the owner. Both of those parties made separate settlements with the stevedore and thereafter the charterer brought an action against the owner, not for a breach of the charter party, but, as appears from the decision of the lower court, 203 Fed. 706, on page 708, for the owner's negligence in failing to keep the strongback in a safe condition. The owner was held liable. If, however, the charterer had brought an action for a breach of the contract, as set out in the charter

party, by reason of the owner's failure to keep the strongback in a proper condition as therein provided, regardless of whether he negligently failed to do so or not, and alleged as damage that it caused a breach of the charterer's contract with the stevedore, regardless of any violations of the charterer's legal duty to the stevedore, the court would then have had occasion to pass on the rule of damage in contract actions.

Although the condition of the strongback could have been discovered by the exercise of due diligence, it did not appear that the charterer had any knowledge of facts which would lead it to believe that the strongback might have been defective, and so, of course, the charterer owed no duty of inspection to the owner.

The opinion in that case cites *Mowbray v. Merryweather* and *Boston Woven Hose & Rubber Co. v. Kendall,* cited in the District Court's opinion in the present case, but the same distinctions exist in those cases. Beyond a doubt if a defendant manufacturer negligently delivers a defective article to be used by the plaintiff's workman and the workman is injured, the defendant manufacturer would be liable to the workman. If the workman collected the damages from the plaintiff by reason of the relation between them of master and servant, the plaintiff will be entitled to indemnity from the defendant manufacturer, if he had no reason to believe that the defect existed. This, however, is no authority for any rule on damages arising out

of a breach of contract, and regardless of the violation of any duty imposed by law. Even if the above English and Massachusetts cases purport to hold that such a ruling should be made in an action *ex contractu,* it would be contrary to the very great weight of authority on the proper rules of damage in such an action, as heretofore pointed out.

In *Pan-American Pet. Co. v. Robins Dry Dock Co.,* 281 Fed. 97, the action was brought by the Steamship Company for the breach of a contract to repair a vessel, in that, the telegraph apparatus from the bridge to the engine-room was not repaired as agreed by the defendant. That case, however, did not involve a liability on a shipper's contract for the transportation of cargo, but the damages claimed arose out of a collision for which the vessel repaired was held liable. The trial court found that the respondent repairer was not guilty of negligence and dismissed the libel. The Circuit Court of Appeals held that the question of negligence was not material (p. 108) because the suit was brought on contract and then laid down the rule that where the owner of the vessel proved a breach of the contract to repair the vessel, thus establishing a prima facie case, the weight of the evidence then shifted to the repairer to prove that he had fully performed the contract. That burden was not met by the respondent repairer. The lower court held that the burden was on the libelant, vessel owner, to prove negligence on the part of the defendant, and so the judgment of the lower court

was reversed. The question of damages was not discussed in the lower court, nor could it even have been raised, because the judgment was for the respondent.

We do not understand that there was any evidence of damage given in the Appellate Court, and so the question as to the proper rule of damage for breach of contract could not have been raised in that court. Beyond a doubt the respondent will be held liable on a retrial of the case for general damages for his breach, the cost of putting the telegraph in the condition specified in the contract, but whether or not the libelant will be able to collect any special damages claimed, remains to be seen. If he does the evidence will have to show that the repairer accepted the liability for those special damages as a condition of the contract. It is no answer to say that if the case is referred to a commissioner he will be called upon only to ascertain the amount of damages. In ascertaining that amount the commissioner will necessarily be called upon to say what items of damage claimed are proper and what items are improper. But whether the question of the proper rule of damage in contract actions is raised in a retrial of that case is not material, as the failure to raise it would not be authority for the contention that therefore the Bethlehem Corporation ought not to raise that question in this case.

There was no evidence in the above case showing that the libelant had knowledge of any facts suffi-

cient to put it upon notice of the defective telegraph. Furthermore, it was found by the court that even if the usual test had been made, it would not have disclosed the defect.

If, in the words of the Circuit Court of Appeals in *Central Trust Co. v. Clark (supra),* in the great multitude of cases involving the failure to make repairs on a vessel according to contract, the necessary result of such a breach has been injury to a shipper's cargo, it is remarkably strange that no such cases ever got into the courts. We have made a diligent search for such a case in the American Courts regardless of whether the action was brought in contract or in tort, but we have not been able to find any, nor have the proctors for the Pacific Mail Company. A search of the English authorities reveals only one case where such a claim was made, and in that case the judgment was given for the defendant. We may then safely assert that there is no authority for the Pacific Mail Company's contention that it may collect as general damage for the breach of the contract, damages to a shipper's cargo. There is no authority holding that such damages may be collected as special damages because the Bethlehem Corporation knew that the vessel, when repaired, would be used to carry cargo, and hence accepted that liability as a condition of the repair contract. There is no authority holding that the Pacific Mail Company owed no duty to the Bethlehem Corporation to take proper precautions by inspection, soundings, or other

means after it had knowledge of facts sufficient to put it upon notice that water in large quantities might enter, or was entering, through the clapper-valve in No. 2 hold. This brings us to the question of whether the Pacific Mail Company had knowledge of such facts, which is discussed in the following section:

4. The Damages Claimed Were Caused by the Pacific Mail Company's Failure to Prevent Further Loss.

Independently of the foregoing reasons why the Pacific Mail Company should not be permitted to compel the Bethlehem Corporation to pay for the breach of the Pacific Mail Company's obligations to its shippers, there can be no liability on the Bethlehem Corporation for that part of the damage which the Pacific Mail Company might have prevented by the exercise of reasonable diligence.

When the "Ecuador" was redelivered to the Pacific Mail Company, on the morning of October 11, 1923, the Bethlehem Corporation had breached its contract in failing to repair the clapper-valves in No. 2 hold. The Bethlehem Corporation then and there became liable for the cost of completing the repairs in that hold in order to make the job comply with the specifications of the contract. This would amount to about one hour's work in fixing the valves, and perhaps a delay for that length of time in loading cargo into the hold. No such damages are claimed, however. Instead the Pacific Mail Company seeks to fasten upon the Bethlehem Corporation a liability for damages to cargo which

occurred some three days after the vessel had been in the exclusive possession of the Pacific Mail Company.

In the case of *Warren v. Stoddart,* 105 U. S. 224, 26 L. Ed. 1117, on page 1120, the Supreme Court said:

> "The rule is, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of of it at a trifling expense or with reasonable exertions, it is his duty to do it. and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. Wicker v. Hoppock, 6 Wall., 94 (73 U. S., XVIII., 752); Miller v. Mariner's Church, 7 Greenl. (Me.), 56; Russel v. Butterfield, 21 Wend., 304; Ketchell v. Burns, 24 Wend., 457; U. S. v. Burnham, 1 Mason, 57; Taylor v. Read, 4 Paige, 571."

The District Court correctly ruled (Apos. p. 790):

> "It is a familiar principle of law that where one is responsible to another in damages for the breach of an obligation it is the duty of the latter, upon discovering the impending damages, to use ordinary care and prudence to minimize the consequence of the other's breach of contract. (Ash v. Loo Sing Lung, 177 Cal. 356, 362; 17 Corp. Jur. 770.)"

Then follows the erroneous ruling that because the Pacific Mail Company ordinarily owed no duty to the Bethlehem Corporation to inspect the vessel, or to take soundings; therefore, if inspections were made and soundings were taken nevertheless, and knowledge of certain facts were gained thereby, still

the Pacific Mail Company would owe no duty to the Bethlehem Corporation to take proper precautions against further damage, apparently for the reason that such knowledge was gained through inspections and soundings which the Pacific Mail Company was not required to make, as far as the Bethlehem Corporation is concerned. The unsoundness of this reasoning has already been discussed.

But, says the District Court (Apos. p. 791):

> "Conceding for argument's sake that the position of the third party respondent in this behalf is sound, still it does not appear from a fair and impartial review of the evidence that the steamship company was guilty of any negligence."

We assume that the District Court did not mean to rule that actual knowledge of the impending damage by the Pacific Mail Company was necessary before any duty arose to prevent that damage. If actual knowledge is essential, a plaintiff could merely testify that he closed his eyes to what he might have observed otherwise, and thus the familiar principle of law stated by the District Court would be completely nullified in so far as its practical application is concerned. In no case would a plaintiff ever admit that he actually knew the impending damage which could have been prevented, would occur. If he was willing to make such an admission he never would have brought the action, and attempt to collect the amount of that damage. In every case where the rule to minimize

damages has been involved, the court has been compelled to say whether, under the circumstances, the plaintiff ought to have known of the impending damage. If it is found that he ought to have known of such damage, this would be held equivalent to actual knowledge, and it would certainly follow that the plaintiff was guilty of negligence in not taking proper precautions to prevent the threatened damage. Thus, the issue on this branch of the case is squarely presented, namely, whether the officers of the "Ecuador" ought to have known that the cargo in No. 2 hold would be injured by sea water flowing into that hold through the clapper-valve. If they had knowledge of facts which indicated that water would, or was, flowing into that hold, it will no doubt be admitted that it was their duty to prevent damage to the cargo by keeping the hold pumped out, which the pumps were fully capable of doing.

After the "Ecuador" was delivered to the Pacific Mail Company at Pier 44, San Francisco, on the morning of October 11, 1923, the Government officials fumigated her. First Officer Dowdy then inspected the vessel to see if she was seaworthy in all respects for the voyage, and the cargo to be carried. Captain Boyce of the "Ecuador" testified that all of the vessel's officers went into No. 2 hold prior to the loading and that it was their duty to do so. (Apos. p. 250.) By this inspection the Pacific Mail Company owed to its shippers the duty of discovering every defect in that hold which would make the vessel unseaworthy, and which was not

a latent defect. Captain Boyce admitted that the defects in the clapper-valves were patent and not latent defects. (Apos. pp. 253, 254.)

Now after the injury occurs, it is a perfectly simple matter for Dowdy to take the stand and testify that he looked only at the floor boards on the occasion in question. But what he may say now is not very material, because the essential point is that he was down in the 'tween-deck of No. 2 hold prior to the time that any cargo was placed therein, and he could have seen that the bonnets were not fastened on the clapper-valves if he had looked. Even the stevedores, who owed no duty to anyone to inspect the vessel, saw daylight through the ship's sides through the forward port clapper-valve in No. 2 hold. (Pacific Mail Company's witnesses Holsten, Apos. p. 114; Trumure Apos. p. 125; Lawson, Apos. p. 133; Kalnin, Apos. p. 153.) Hence it may be said with the greatest reason that he ought to have known of their defective condition, and because he now says that he chose to close his eyes to any possible defects in the clapper-valves will not justify a ruling that therefore he ought not to have known of their condition. Over and above that the court is entitled to take into consideration that one of the very purposes of his inspecting the hold was to see that no defects existed in any of the appliances in that hold, including these clapper-valves, and it is not at all material that he owed that duty to the shipper instead of the Bethlehem Corporation. That would

in no way establish that he did not inspect the hold or alter his purpose in making the inspection.

But the foregoing is not the only reason why it should be held that Dowdy ought to have known of the defective clapper-valves in No. 2 hold. One of the stevedore foremen called his attention to the fact that daylight could be seen through the ship's side in No. 2 hold. He went into that hold with the foreman, who pointed out the place, and found that the bonnet was off the forward port clapper-valve. Dowdy then called the chief engineer, Murray (Apos. p. 259), and the chief engineer fixed the valve in about 15 minutes. (Holsten, Apos. p. 115.) This would have suggested to an ordinarily prudent man that possibly the other valves in No. 2 hold had been left open, and it did to First Officer Dowdy.

(Apos. p. 261):

"Q. After the chief engineer had set up the bolts on this bonnet, as you have described, what next did he and you do?

A. We went by to locate the other clapper-valves which were located in No. 2, and find out if all those clapper-valves were set up; we did the best we could do, we went on top of the cargo, which gives just enough space to wiggle through between the frames, and with a flash light we looked down where the cargo cannot be stowed, a space of a little more than a foot—

Q. Just let me stop you for a second; did I understand you to say there was enough space to wiggle through?

A. Yes.

Q. You say you wiggled through to look at the other clapper-valves in No. 2?

A. Yes.
Q. Which were those?
A. The after one on the port side in No. 2 and the others on the starboard side of No. 2 also."

Chief Engineer Murray also testified that he crawled over the cargo to inspect the clapper-valves located on the port and starboard sides aft in No. 2 hold, but that he was unable to see them on account of the cargo. (Apos. p. 42.) It is a significant circumstance that while both Dowdy (Apos. p. 262) and Murray (Apos. p. 422) testified that they went into other holds of the vessel and looked at the clapper-valves not covered with cargo, they made no such efforts to examine the ones which were covered as were made to examine those covered in No. 2 hold.

The fact that the cargo obscured the view of the other valves in No. 2 hold, in no way prevented Dowdy or any one delegated by him, from stepping to the telephone on the dock and inquiring of the Bethlehem Corporation whether or not the bonnets on the other clapper-valves in No. 2 hold had been put in place. If that had been done, as it should have been, it would have been the work of a very few minutes for the Bethelehem Corporation to make inquiry and then send a man down to the vessel to repair the other two valves.

The condition of the clapper-valve forward on the port side in No. 2 hold was discovered about 3 P. M. on Friday, October 12, 1923. (Pacific Mail

Company's witness Trumure, Apos. p. 127.) This valve is located about 6 feet above the floor of the 'tween-deck, and so is the one aft on the port side. The starboard clapper-valve is about 30 inches above the floor of the 'tween-deck. The 'tween-deck is 8 or 9 feet in height. (Pacific Mail Company's witness Trumure, Apos. p. 130.) At that time there were two carloads of copper on the floor of the 'tween-deck aft, piled from two to two and one-half feet high. (Pacific Mail Company's witnesses Triton (Apos. p. 74); Lawson (Apos. p. 137); Trumure (Apos. p. 128).) The placing of the cargo then in the 'tween-deck is described by the Pacific Mail Company's witnesses as follows:

HOLSTEN (Apos. p. 110):

"Q. At that time what was the condition as to the stage in loading which had been reached in No. 2 'tween-deck?

A. All the after end was full and both wings were full, all but about eight or ten feet abreast the hatch.

Q. How about the forward end up where you saw this light and where the work was done?

A. In the forward end there was a space there of about 12 feet where they had not finished yet."

TRUMURE (Apos. pp. 127, 128):

"Q. What state had the loading reached at that time, in the after part of No. 2 'tween-deck?

A. It was approximately loaded full, within four or five feet up to the place where the clapper-valve was, from either side, from the forward end and the after end.

Q. Which clapper-valve are you referring to?

A. That was on the port side, forward.

Q. The one where you saw this work done?

A. Yes, where this work was done."

CHRISTIAN (Apos. pp. 159, 160):

"Q. What portion of the 'tween-deck hold had cargo in it when these men were working on the pipe?

A. The after part of the 'tween-deck.

Q. How far forward—up to the hatch?

A. Right up to the hatch."

DOWDY (Apos. pp. 298, 299):

"Q. And you say that the square of the hatch was filled up with cargo?

A. No, the square of the hatch was not filled up, neither was the front of the forward bulkhead filled, but built around the square of the hatch was all filled up.

Q. Aren't you mistaken about that, Mr. Dowdy, because you reached the port clapper-valve in the forward portion, and there was no cargo there; there was no cargo there, was there?

A. No, not at that time.

Q. How far back of that was the space unfilled with cargo?

A. From about one-third of the hatchway forward.

Q. What was in there, flour?

A. There was general merchandise—flour, boxes, gunny bags, beans."

MURRAY (Apos. p. 420):

"Q. What was the condition in the after part of the 'tween-deck as to cargo?

A. It was loaded up full with cargo.

Q. How wide was the spread of the cargo? Do I make myself clear talking in non-sailor

language? By the 'spread' I mean the width; from side to side athwartships.

A. Athwartships there was a space clear in the middle from the hatches for the cargo to land, and they were lifting the cargo from that space to the wings."

From this testimony of the Pacific Mail Company's witnesses we may fairly conclude that at 3 P. M. on Friday, October 12, 1923, when the defective clapper-valve was discovered in No. 2 'tween-deck, the after end was loaded with copper, at least two feet high. Now if, as testified, the height of the 'tween-deck was about nine feet, and allowing, say a two-foot space between the top of the cargo and the ceiling, through which Murray and Dowdy crawled, this would make the general cargo in the aft end some five feet high from the top of the copper. The narrow spaces between the sides of the 'tween-deck and the hatch coaming were filled, except about ten or twelve feet on each side, which was used for loading. There was no cargo in the square of the hatch or in the forepart of the 'tween-deck. The square of the large hatch filled to the ceiling of the 'tween-deck certainly would hold more cargo than the small amount then stowed along the sides of the hatch, and so it is a fair statement to say that the 'tween-deck was considerably less than one-half full.

Now the question arises: suspecting, as First Officer Dowdy did, and as he could have been advised within a short time, that the bonnets were not on the clapper-valves located aft in No. 2 hold, how

long would it have taken to have removed a sufficient amount of cargo in order to repair those valves? Dowdy testified that all of the cargo would have to be taken out of the 'tween-deck in order to get at those valves, and that it would take several hours. (Apos. p. 299.) When pressed for a statement as to the number of hours, the highest estimate he dared to give was six hours. (Apos. p. 300.) It appears, however, that after the forward port clapper-valve was fixed the balance of the 'tween-deck was filled at 5 P. M. on Friday (about two hours), except the space in the wings of about six or eight feet, and it would have taken about 20 minutes to have filled that. (Pacific Mail Company's witness Triton, Apos. p. 70.) In fact, that space and the trunkway of the hatch, that is, the square of the hatch, were filled in two hours, making a total of about four hours to completely load more than half of the 'tween-deck. (Triton, Apos. pp. 76 and 77.)

If, as it appears, more than half of the cargo of the 'tween-deck could be, and was, loaded in about four hours, it certainly would not have taken any longer a time than that to have unloaded all of the cargo in the aft end of the 'tween-deck. But it was unnecessary to take out all of the cargo loaded there in order to get at the clapper-valves. It was unnecessary to remove the two carloads of copper, as they did not come up above the starboard clapper-valve aft, which was the lower of the two valves; being about 30 inches above the floor of the 'tween-deck. It was unnecessary to take out all of the

general cargo loaded on top of the copper in order to get at the port clapper-valve aft in the 'tween-deck, because that valve could not have been more than a foot or two below the top of the general cargo; it being some six feet above the floor of the 'tween-deck, and the general cargo on top of the copper could not have been higher than seven feet above the floor. As for the starboard clapper-valve aft, a small channel or alley way could have been made through the general cargo in a very little time, especially in view of the fact that there were open spaces in the 'tween-deck alongside of the square of the hatch and in the forward end to which this cargo could have been shifted. All of this undoubtedly could have been accomplished in about two hours. But let us make a liberal allowance and increase this calculation 100% by estimating that it would have taken four hours to have shifted a sufficient amount of cargo in order to fix the other two valves in No. 2 hold.

The correctness of this estimate is further supported by the time that it took to unload the cargo at Wilmington, not only in the 'tween-deck, but including the square of the hatch from the shelter deck to the main deck. The "Ecuador" arrived at the dock in Wilmington about 10 A. M. or after, Monday, October 15. (Apos. p. 266.) The Chief Engineer's log shows that the cargo was out of the 'tween-deck at 5 P. M. of that day. (Apos. p. 212.) The Pacific Mail Company's surveyor, Dupuy, was

on board from 5:30 P. M. to 6 P. M. Monday (Apos. p. 529), and examined all of the valves in the 'tween-deck (Apos. pp. 530, et seq.) so that all of the cargo must have been out of the 'tween-deck at that time. Also the Pacific Mail Company's witness Smith (Lloyd's surveyor) testified that he examined the starboard clapper-valve at 5 P. M. on Monday. (Apos. p. 563.) So that, if the vessel was made fast and preparation made for unloading as early as 11 A. M. Monday and the 'tween-deck was finished at 5 P. M., taking an hour off for noon it would leave 6 hours time for discharging all of that cargo in its damaged condition. The allowance of 4 hours to move and repair sufficient cargo to get at the clapper-valves aft in the 'tween-deck in the state of loading it was at 3 P. M. on Friday, October 12, seems especially liberal in view of these facts. The cost of so doing would have been very trifling in comparison to the probable damage which would be caused by water flowing in through one or both of those clapper-valves, if open.

Where it was discovered that the bonnet was left off of a clapper-valve in No. 2 hold, the other two in that hold being covered with cargo, and thereafter such clapper-valves in other holds as were not covered by cargo, were found in order, an ordinarily prudent person would naturally conclude that the Bethlehem Corporation had overlooked the valves in that hold—not that it had fixed two valves in that hold and happened to overlook the one, which did not happen to be covered with cargo at the time that

its defective condition was discovered. This is not looking at the situation in retrospect.

In any event the situation ought not to be held such as to permit the Pacific Mail Company to speculate at the expense of the Bethlehem Corporation, especially when a mere telephone call would have placed the decision squarely up to the latter. If the bonnets were on those two clapper-valves, all would be well and good, and the Pacific Mail Company would save itself the trouble of inspecting them at a time when it was somewhat inconvenient to do so. On the other hand, if the bonnets were not on those clapper-valves, then, the Bethlehem Corporation would pay for any cargo which might be damaged. Thus there would be no benefit to the Pacific Mail Company whatever in taking the trouble to confirm the belief in regard to the condition of those clapper-valves, and if there was any detriment the burden would fall upon the Bethlehem Corporation.

The Pacific Mail Company felt that First Officer Dowdy ought to have known that water might enter through the other two valves in No. 2 hold, and that he should have taken some action to prevent the probable damage to cargo stowed in that hold. This is apparent from the fact that he lost his job as First Officer on the return trip of the "Ecuador," and he was reduced to the position of a checker on the pier. He is now a relieving officer—in other words, a watchman. (Dowdy, Apos. pp. 272, 273.)

The duty to prevent further damage was again violated by the Pacific Mail Company, in that, with additional knowledge of facts sufficient in themselves to put that Company upon inquiry, the damages over and above the trifling cost of repairing the clapper-valves, as called for by the contract, again could have been prevented by reasonable endeavor and exertion.

The "Ecuador" set out on her voyage at 10:20 P. M., October 13, 1923. Nothing out of the ordinary occurred until 10 P. M. Sunday, October 14th, when the quartermaster, Puddu, took soundings and found 35 inches of water on the sounding rod in No. 2 port bilge (Apos. p. 364), and this was reported to the master, Captain Boyce (Apos. p. 167), by the Second Officer Sutter, who was then on watch (Apos. p. 338). The prior soundings, taken about 5 o'clock, showed that there were 6 inches of water in that bilge, so that at 10 P. M. Sunday the vessel's officers knew that water was flowing into No. 2 hold at a rapid rate, and had reached an extraordinary height, as Captain Boyce testified it was then only 6 or 8 inches from the cargo. (Apos. p. 168.)

Captain Boyce (Apos. p. 208):

> "Q. Didn't you say, captain, that it is a very unusual thing to find 35 inches of water in the hold?
>
> A. Unusual, yes."

Quartermaster Christenson (Apos. pp. 332, 333):

"Q. Did you ever hear in any of the vessels in which you have been of as much as 35 inches of water being in their holds, as a usual and customary thing?

A. No.

Q. That is very unusual, isn't it; that is very unusual, isn't it? Just look at me Mr. Christenson: That is very unusual, isn't it?

A. I don't know, but I guess it is; I couldn't say.

Q. If you are making soundings, sounding a hold, and find 35 inches of water in it, you would instantly know that something was wrong, wouldn't you?

A. I would report to the officer on watch if I was in doubt whether there was something wrong.

Q. You would not be in doubt about that at all, would you? You would know immediately, wouldn't you, if you found there were 35 inches of water in a hold that there was something wrong?

A. I should think so."

PILLSBURY (Expert witness for Pacific Mail Company, Apos. p. 515):

"Q. * * * That was an unusual amount of water in her hold, wasn't it?

A. Yes.

Q. That amount of water in her hold indicated something serious being the matter, didn't it?

A. Yes."

Chief Engineer Murray admitted that it was an unusual thing to have 35 inches of water in a bilge, but would not say it was serious, although he believed that if it reached 40 inches, it would come in contact with the cargo (Apos. p. 463). No doubt

Mr. Murray meant that it would not be a serious thing as far as the possibility of sinking the vessel was concerned, because it certainly would be serious for the cargo. The only person to whom such an amount of water in the hold did not mean that there was something wrong was Third Officer Erickson (Apos. p. 310) on the 12 to 4 watch Monday morning. He was discharged, however, when the vessel returned from her voyage (Apos. p. 311), and has not worked since. (Apos. p. 316.)

But the statements of both Captain Boyce and Chief Engineer Murray that the water was 5 or 6 inches from the cargo at 10:00 P. M. Sunday are incorrect. The exact measurements show that the bilge tank tops were 36 inches from the bottom of the vessel and the cement in the bottom was 6 inches deep, leaving 30 inches as the depth of the bilge tanks. That in taking soundings the sounding rod came 9 inches from the cement bottom of the tank, so that when a sounding showed 35 inches of water in the bilge there were in fact 44 inches in the bilge. But the bilge was only 30 inches deep so there were 14 inches of water over the tank tops and in the cargo space of No. 2 hold at 10:00 P. M. Sunday (Murray Apos. pp. 444, 445, 446).

The following excerpt is from the testimony of Murray (Apos. pp. 445, 446) in reference to his sketch showing the bilge and sounding pipes:

> "A. The top of the tank would be 36 inches above the bottom of the ship, 30 inches above the cement in the bilge.

Q. So that there would be a free space for water in the bilges on both port and starboard sides of a clear 30 inches?

A. 30 inches.

Q. And when your sounding-rod on the port side indicated 36 inches, there would at that moment, have been six inches of water over the double bottom tanks and into the cargo space; is that correct?

A. When your sounding board (rod) would indicate 36 inches, there would be actually 45 inches in the bilge, from the bottom of the bilge.

Mr. LILLICK. We offer this sketch as our next exhibit."

(The document was here marked Bethlehem Shipbuilding Company, Third Party, Exhibit "I".)

With this knowledge on the part of the vessel's officers in ample time it cannot reasonably be denied that it was their duty then and there to take every precaution in order to prevent the cargo from being injured by sea water. Common prudence demanded that carefully checked soundings be taken frequently thereafter in order to ascertain the rate at which the sea water was entering the hold and its height kept down to the proper limit at all times by the use of the pumps. Its source also could have been ascertained, as there were only two ways in which the sea water could have entered the hold under the circumstances. One through the bilge pipes from the engine-room and the other from the clapper-valves. The former could have been checked in the engine-room, leaving the clapper-valves the only source. The starboard aft clapper-

valve was the only one under the water in No. 2 hold, and as it was known that a bonnet had been left off of another valve in that hold, the problem was an easy one and its solution just as easy. It is clearly apparent that the "Ecuador's" pumps could have taken care of all of the water that flowed in through the starboard clapper-valve.

The outside opening in that valve was 2⅝ inches in diameter. (Witness Dupuy, Apos. p. 534.) Second Engineer Morend testified that there were two four-inch pipes on the pumps into the bilge on each side. (Apos. p. 383.) Chief Engineer Murray testified that the pipes into each bilge were 2½ inches in diameter and both ran into a common suction pipe 3½ inches in diameter at the manifold in the engine-room. (Apos. p. 451.) That the pumping areas of the common suction pipe and the two bilge pipes combined were practically the same. (Apos. p. 456.) Taking Mr. Murray's testimony as correct, it ought not to need much argument to support the statement that the two 2½ inch bilge pipes, with efficient pumps, could have taken care of all water that flowed in through the starboard clapper-valve in No. 2 hold, had they been put on at the proper time. This is admitted by the Pacific Mail Company's witnesses Murray (Apos. p. 468) and Pillsbury. (Apos. pp. 520, 521.) The testimony of the Bethlehem Corporation's witnesses was to the same effect (Barker, Apos. p. 590; Muller, Apos. p. 668; Stoddart, Apos. p. 725).

The ability of the pumps and bilge lines to pump out all of the water as fast as it came in through the clapper-valve is shown in another way. It appears that the port valves in No. 2 hold were at least 3 feet above the water line (Apos. p. 188) and 6 feet above the floor of the 'tween-deck. The starboard valve was 2½ feet above the floor of the 'tween-deck, which would make the latter valve 3½ feet lower than those on the port side; they being 3 feet at least above the water line would make the starboard valve ½ foot below the water line. First Officer Dowdy said it was several feet. He was not sure how many, but when asked for his best judgment answered 3½ feet below the water line. (Apos. p. 301.) Chief Engineer Murray was doubtful, but estimated it at about 3 feet below the water line. The Bethlehem Corporation's witness Barker sighted along a line of the vessel determined by her fore and aft drafts when she set out on her voyage and concluded that the starboard valve in No. 2 hold would be just about at the water's edge.

Assuming that it was as much as 3 feet below the water line, the water would have flowed in at the rate of approximately 30 tons per hour. (Pacific Mail Company's expert witness Dupuy, Apos. p. 537.) The exact number of tons might be as much as a ton or so more or less than 30 tons per hour, due to the rolling of the vessel and motion through the water, if those elements would effect the amount of the inflow either way.

The Bethlehem Corporation's expert witness Muller testified that under a three-foot head the water would flow through the starboard clapper-valve at the rate of 30.7 tons per hour (Apos. p. 661), and expert witness Stoddart, also for the Bethlehem Corporation, gave as his estimate 32.3 tons per hour under a three-foot head. (Apos. p. 721.)

Chief Engineer Murray was asked how many gallons of water could be discharged a minute with both of the donkey pumps and the main-line engine pump running on the bilge lines in No. 2 hold. He evaded the question several times and finally said that he had never figured it out (Apos. p. 476), but that about 100 tons of water per hour could be pumped with the ballast pump from the deep tank with a six-inch pipe running into that tank.

Chief Engineer Murray (Apos. p. 477):

"Q. Then by pumping on one of those six-inch pipes you can pump in or discharge 100 tons of water an hour?

A. Yes.

Q. An hour?

A. Yes.

Q. Then the circulation would be the comparison between two 2½ inch pipes and one six-inch pipe?

A. It would just be the ratio."

That comparison works out as follows:

$\frac{9.8}{28.2}$ of 100 equals 35. 1, the number of tons per

hour which could be pumped from No. 2 bilge with one pump. Two pumps could have been put on No. 2 bilge, however, and they were put on the following morning. (Murray, Apos. p. 477.) Two pumps were more efficient than one. That does not include the main-line pump, however, but refers to the two donkey pumps. We mention this because there is testimony in the record that two pumps could not be used on the bilge lines, as they would work against each other. That is only true of the main-line pump working with a donkey pump. The Pacific Mail Company's expert witness Smith, Lloyd Surveyor, testified that the pumps on No. 2 bilge were discharging approximately 60 to 70 tons per hour while the vessel was at Wilmington, with two pumps on those bilge lines. (Apos. p. 562.) We are quite safe in saying, then, that approximately twice as much water could have been discharged through the bilge lines than was entering at No. 2 hold through the clapper-valve.

Further proof appears in the vessel's log, too, of Monday, October 15th, that the pumps could and did take care of the inflow. If the engineer's log is accepted as correct, the ballast pumps were put on No. 2 bilge at 7 A. M. Monday, and discharged a good steady stream. The vessel was dry at 1 A. M. Tuesday, making the time 18 hours that the pumps were running, the first ten hours of which time the water was flowing in through the clapper-valve. (Apos. p. 212.) The smooth deck log says that orders were given to use the pumps at 6 A. M. Mon-

day (Apos. p. 213), making 19 hours that the pumps were running, the first 11 of which water was flowing into the hold. In either event, it sufficiently appears that the pumps could and did discharge more water than flowed in through the starboard clapper-valve.

Now, if the officers of the "Ecuador" ought to have known that water would, or was, entering through the clapper-valves in No. 2 hold, it was their duty to put the pumps on that hold and to keep the water out of that hold as fast as it flowed in. If they had knowledge of facts sufficient to put them upon inquiry, which in this case would have revealed the true situation, they will be charged with knowledge of that situation.

The District Court held in effect (Apos. pp. 791, 792) that because First Officer Dowdy, when he inspected No. 2 hold before the cargo was loaded therein, closed his eyes to the obvious, he should not be charged with knowledge of the defective clapper-valves. No notice is taken of the fact that other officers of the vessel inspected the hold prior to the loading of the cargo. That although the vessel's officers suspected that the other valves in No. 2 hold were defective, after discovering that one had not been repaired, they ought not to be charged with such knowledge because they did practically everything possible under the existing conditions, short of discharging cargo, and they also examined other accessible valves in other holds and found none defective. This "everything possible" excepts,

of course, the possibility of moving a sufficient amount of cargo in the half filled 'tween-deck of No. 2 hold in order to get at the other two clapper-valves, and also the possibility of obtaining information by telephone from the Bethlehem Corporation in reference to the condition of those other two valves. That because accessible valves in other holds were found in order, the Chief Engineer (and the Chief Officer) were justified in assuming that the two valves in No. 2 hold, where the third valve was found unrepaired, had been properly repaired. In other words, if a clapper-valve located in No. 2 hold is found defective that would lead to the conclusion that the clapper-valves in holds Nos. 1, 3 and 4 were defective, but if some of the clapper-valves in holds Nos. 1, 3 and 4 were examined and found in order that would lead to the conclusion that the other two clapper-valves in No. 2 hold had been properly repaired. We think that the proper conclusion would be the one made by Messrs. Murray & Dowdy that No. 2 hold had been missed by the Bethlehem Corporation.

Again, says the District Court (Apos. pp. 792, 793):

> "It is likewise true that there were 35 inches of water in the bilges at 10 o'clock at night about 24 hours after the vessel left port. The captain, realizing that this was unusual, directed pumps to be put to work on the bilges at once and an extra sounding to be taken at midnight, and on retiring left word that he be called immediately if the amount of water should increase. At 12 o'clock that night the

> sounding showed but 25 inches. Another sounding at 2 o'clock disclosed the same amount. *Later the pump sucked air, indicating that all water was out of the bilges.*"

The District Court fell into error in finding that after 2 A. M., Monday, October 15th, the bilge pump sucked air indicating that all water was out of the bilges. The main-line pump was put on No. 2 bilge about 10:20 P. M. Sunday, the 14th, and sucked air at about 11:00 P. M. (McKenna, 3rd Engineer, on watch, Apos. p. 397.)

Thus, instead of keeping the pump on No. 2 bilge from 10 P. M. Sunday night until after 2 A. M. the following morning, and thereafter No. 2 hold suddenly filled with water to the depth of 20 feet, the facts are that the pump was only kept on that bilge about forty minutes, until 11 P. M., and one hour thereafter it had filled again to the depth of 25 inches, that is, 25 inches on the sounding rod. 34 inches of water had actually flowed into No. 2 hold during that hour, bringing it 4 inches over the tank tops and into the cargo space. (Murray, Apos. pp. 444, 445, 446.) If the District Court had not erred in this finding, it probably would have been very reluctant to impliedly hold that the officers of the "Ecuador" ought not to be charged with the knowledge that water was flowing into No. 2 hold at an unusual rate.

(Apos. p. 793):

> "As before stated *even if there were negligence* here, it would be at most a breach of duty

to the shipper and not to the repairer of the vessel."

While we think that any one of the three set of circumstances heretofore discussed would be sufficient to charge the officers of the "Ecuador" with knowledge that further damage would result if action were not taken to keep down the inflow of water in No. 2 hold, still it was incorrect for the District Court to consider each set of circumstances separately and hold that each set, considered by itself, was insufficient to charge the vessel's officers with such knowledge. The whole situation should be regarded from its four corners. To summarize generally the officers of the "Ecuador" had knowledge of the following facts at 12 o'clock Sunday night. All of them had been down in No. 2 hold prior to the time that the cargo was loaded therein and went there for the purpose of making an inspection to see if the hold was in every way fit to receive cargo. If they did not observe that the bonnets of the clapper-valves were not fastened thereon, it is because they closed their eyes to what was a patent defect. Moreover, their attention was called to a clapper-valve in the 'tween-deck of No. 2 hold when that deck was partially loaded, and the daylight was shining through the side of the vessel through that clapper-valve. They knew, therefore, that one clapper-valve had been missed in the 'tween-deck of No. 2 hold and they had a strong suspicion that the other two in the aft end of that deck had been missed, as evidenced by their crawl-

ing over the cargo and attempting to examine them. At 10 o'clock Sunday night they knew that there were 44 inches of water in the bilge of No. 2 hold, 35 on the sounding rod, which brought it 14 inches above the bilge tank tops and into the cargo space. This was pumped out at 11 P. M. and at 12 P. M. they knew that 34 inches of water had flowed back into that hold, 25 inches on the sounding rod, within one hour.

On this state of facts we submit that the officers of the "Ecuador" ought to be charged with knowledge that at midnight, Sunday, water was flowing into No. 2 hold at a rapid rate, and we are not viewing the situation in retrospect when we further contend that they should have put the pump, or pumps, on that hold and kept the water down as fast as it flowed in. We have been unable to find any authority indicating that a contrary ruling should be made, and our attention has not been called to any by opposing counsel. On the other hand the following cases strongly support the contention here made by the Bethlehem Corporation.

In admiralty we find the rule applied to collision cases and holding that the failure of the injured vessel in failing to prevent further damage after the collision is the proximate cause of such damage and not the collision.

The case of *The Transfer No. 8,* 88 Fed. 551, was decided by Judge Brown of the Southern District of New York. In that case the barge "Maine" was

damaged through the mutual fault of the "No. 8" and the "Waterman", and was in a sinking condition. Thereafter the "Maine" was taken by the "Waterman" into deep water where she sank. It was held that the "Waterman" had such notice of the "Maine's" condition as to require the "Waterman" to beach her and the sum of $1000.00 was charged to the "Waterman" because it was not the proximate result of the collision but due entirely to the "Waterman's" failure to prevent additional damages. The court said in reference to the master of the "Waterman" (p. 552):

> "He saw those on board abandoning her; and this, with the fact that she was gradually sinking, was sufficient notice to him that she must speedily go down and could not probably reach Port Morris Creek."

In the *M. E. Luckenbach,* 200 Fed. 630, affirmed 214 Fed. 571, the tug "Luckenbach" was towing the loaded coal barges, "A. G. Ropes", "William H. Conner" and "Henry Endicott" in the order named. There was a slight collision between the "Ropes" and the schooner, "Hugh Kelley", and the "Ropes" cast off the "Conner" to permit the schooner to cross through the tow. The "Conner" dropped one of her two anchors, but some 15 or 20 minutes afterwards she stranded on a shoal some three-fourths of a mile from where she was cast off, and was lost with her cargo. The owners of the barge and the owners of the cargo libelled the tug "Luckenbach" for the loss of the barge and cargo.

The "Luckenbach" brought in the schooner, "Hugh Kelley", as a third party respondent. The "Luckenbach" was found in fault and solely responsible for the collision, but it was held that the "Luckenbach" was not liable for the damages caused by the loss of the "Conner" and cargo, for the reason that the proximate cause for that loss was the negligence of the "Conner's" master in not dropping both anchors, which, with sufficient chain, would have held the "Conner" against the action of the tide and wind.

The court said in reference to the failure of the "Conner's" master to take such precautions as his knowledge of the situation seemed to require, at the time that his barge was cast off, which would have prevented the loss of the barge and her cargo:

> "The situation, then, appears to have been this: There was a collision between the schooner and the barge Ropes, in which, however, the contact was so slight that no damage was done to either vessel. Nevertheless the captain of the Ropes, in the exercise of what is conceded to have been a wise precaution under the circumstances, cast off the hawser connecting the two following barges.
>
> It was the obvious duty of the captain of the Conner to anchor at once, even if he had not been signaled by the tug to do so. Eventually he did so, dropping his 3,500-pound port anchor. The evidence shows that the bottom was good for anchorage; and that the anchor put over should have sufficed to hold such a barge, if sufficient chain were put out. Nevertheless, about 15 minutes later the barge was carried by the tide and cast aground on a shoal spot nearly

three-quarters of a mile distant, with the 3,200-pound starboard anchor on board. The necessary conclusion is, either that the captain of the barge neglected to anchor until just before grounding, or that, although he did put over one anchor shortly after being cast off, the barge dragged on the anchor, and he neglected to give out sufficient chain, or, at all events, to put over his second anchor. In view of the irreconcilable conflict in the testimony, it is very difficult to determine just what happened. Evidently, Capt. Printz did not get his anchor down as quickly as he claims. But I believe that the barge dragged her anchor for a considerable part of the distance traversed, due to the action of the tide and swell on a short anchor chain. *In either event the neglect on the part of the captain of the barge to take the simple precautions which the situation required constitutes the proximate cause of the stranding.* It is not a case of concurrent fault on the part of the tug and the barge. The fault of the barge was not a contributing cause. It was, under the circumstances, the efficient and proximate cause of the damages claimed. The evidence shows that Capt. Printz had ample opportunity, after learning that his barge was adrift, to anchor her. There was nothing in the surrounding circumstances to cause any particular excitement on the part of an experienced mariner in the fact that his barge was cast adrift, and he was ordered to anchor. *It was a simple, obvious precaution, and called for the exercise of merely ordinary care.* If Capt. Printz had exercised ordinary care, the barge would not have grounded."

In *The Drill Boat No. 4,* 233 Fed. 589, a drill boat stationed over a ledge in a channel was sunk by the spuds, which held it in place, becoming

jammed in the housing as the tide fell. The watchman returned early the next morning and so did the day crew, but nothing was done to mark the sunken drill boat, which, at that time, was visible. Later in the day, however, due either to a rising of the tide, or the sinking of the drill boat in the mud, it became completely submerged and was struck by a steamer, the latter receiving severe injuries. The owner of the drill boat petitioned for limited liability, which petition was denied, not only on the ground that the drill boat was unseaworthy, but because the owner ought to have known that the drill boat would become submerged, because of the rising tide or settling in the mud, and he should have taken reasonable precautions to prevent injury to his own and other vessels by placing a marker to indicate the location of the drill boat when it became submerged.

The same rule is also applied in admiralty cases involving contracts between the vessel's owners and the shippers.

In *The Ocean Wave,* Fed. Cas. No. 10,416, a river steamer had a barge in tow, and the barge struck a bar in the river. The steamer attempted to push the barge off and in doing so the timber head on the barge was broken in, and a bolt was drawn, which held the timber head under the water line, allowing the water to enter the hold and damage the cargo. The owner defended upon the ground that the stranding was a danger of the river, which peril was excepted under the bill of lading. The

court held, however, that the captain knew of the broken timber head and ought to have known that water might enter the hold.

> "The leak could have been discovered by going into the hatch, or by looking into either of the scuttle hatches, or by the use of pumps, which would take water out at two inches depth."

The case of *The Guildhall,* 58 Fed. 796, was also decided by Judge Brown of the Southern District of New York. In that case, a libel was filed to recover for damage to cargo in barrels on a voyage from Rotterdam to New York. The vessel came into collision with another steamer and put into London for repairs. Thereafter she set sail for New York and encountered heavy weather on the voyage. The libelants contended that the damage was caused by the collision. The vessel owner contended that it was caused by the tempestuous weather. The court found that it was due primarily to the collision, but found it unnecessary to decide whether such damage was exempt under the bill of lading. This was for the reason that the vessel owner had not exercised due diligence in preventing further damage by inspecting the cargo when the vessel was under repairs in London and at a time when the owners knew that cargo in other holds had been damaged by the collision. The court says on pages 799 and 800:

> "As to the loss subsequent to the collision, it appears that the barrels in question were stowed in hatch No. 3; that a very slight inspec-

tion, on removing the after hatches in London, would have shown that these casks were damaged and needed repair. Forward, the cargo was examined; and being found injured by the collision, about one-third of the whole cargo was discharged, warehoused, and reconditioned. No damage, however, having been suspected aft, that part of the ship where the libelant's goods were stowed was not examined. Hatches Nos. 3 and 4 were not opened. *Having notice of damage to the cargo by collision, it was at the vessel's risk that even the most superficial examination, by removal of the after hatches, was neglected.* This negligence is attributable to the owners."

The same rule prevails on the law side of the court.

In the case of *Pere-Marquette Railway Co. v. The Chicago & Eastern, etc., Railway Co.,* (C. C. A.) 255 Fed. 40, a shipper delivered a shipment of beans to the initial carrier, and a wrongful delivery was made by the connecting carrier, which made deliveries without requiring a surrender of the bills of lading. The shipper recovered judgment against the initial carrier, which sought indemnity from the connecting carrier. The carriers used two standard forms of bills of lading: One a straight bill of lading, which did not have to be surrendered before delivery of the goods, and the other an order bill of lading, which did have to be surrendered, and contained the words, "Consigned to order of ....". The initial carrier issued a way bill, but the way bill stated the consignee to be

"order of" a person named, other than the shipper. The connecting carrier contended that the initial carrier was not entitled to indemnity, because the initial carrier negligently failed to notify the connecting carrier that the shipping documents should be surrendered before delivery, and the trial court so held. The Appellate Court reversed this decision on the ground that the way bill issued sufficiently apprised the connecting carrier that there were outstanding, against those shipments, order bills of lading which should have been surrendered before the delivery of the shipment. The court says on page 42:

> "If the truth is as stated by appellees' freight agent that from these waybills one familiar with such matters could not judge whether a straight or an order bill of lading was outstanding for the shipments, it would certainly suggest that, before treating them as straight bills of lading at the risk of entailing loss on the shipper or the initial carrier, *he make inquiry for the purpose of resolving the doubt according to the readily ascertainable facts.*"

The rule that a plaintiff will not be entitled to indemnity from one primarily liable, where he has knowledge of facts which are sufficient to put him upon notice in regard to the possible danger and further damage, is merely a corollary to the rule that it is the duty of a plaintiff to minimize a loss rather than to increase it.

The case of *McNeil, Higgins Co. v. Old Dominion S. S. Co.,* (C. C. A.) 235 Fed. 854, was an action at

law to recover damages arising out of the shipment of a car load of coffee from New York to Chicago. The shipment encountered the so-called Dayton flood and wind storm at Peru, Indiana, and the top of the car was blown off and the coffee was wet by the rain and flood. It was admitted that the storm encountered came within an excepted liability under the bill of lading, but the shipper based his action upon the carrier's failure to prevent further damage after the storm was encountered. The cargo of coffee was held by the carrier at Peru, then taken to Cincinnati and later to Chicago where its sale brought only a nominal sum. It appeared that if the coffee had been promptly cared for the damage would have been comparatively slight. The District Court directed a verdict for the defendant carrier, but this ruling was reversed on appeal, and a new trial ordered, on the ground that it was the duty of the carrier to exercise reasonable diligence to prevent further loss. In disposing of the defendant's claim that the coffee could not be forwarded promptly to its destination because the record, showing the name of the consignee and destination, was lost in the flood, the Appellate Court observed that such information was obtainable by the carrier; that the conductor of the train had that information in his train book; that the car was in a train that was obviously routed from East to West; that defendant also had available permanent records kept at Newport News, Va., which showed the destination of the car in question, and that plaintiff had

notified defendant's agent that he was expecting a car of coffee, and defendant notified plaintiff some seventeen days after the injury occurred that the car was in the flood at Peru.

And in the State Courts:

The case of *Alaska-Pacific Steamship Co. v. Sperry Flour Co.,* (Wash.) 211 Pac. 761, was the third appeal of that case to the Supreme Court of the State of Washington, and the same ruling was made each time. A workman of the steamship company walked out on the plank from the dock to a dolphin for the purpose of casting off the lines of the vessel. He was injured by the unsafe condition of the plank. The dock and dolphin were both owned by the flour company and the plank was furnished by it. The workman recovered judgment against the steamship company, which sought indemnity from the flour company. The court held that the plank approach was as much under the steamship company's control as the flour company's during the loading operation. That the swaying of the dolphin was known to the steamship company, and its probable effect upon the plank approach; hence, under those circumstances, with that knowledge, the failure of the steamship company to take proper precautions for preventing the injury was an independent act of negligence. The claim of the steamship company for indemnity was denied.

In the case of *Appalachian Corporation v. Brooklyn Cooperage Co.,* (La.) 91 So. 539, the court, in

allowing plaintiff to recover indemnity for injuries to its employee caused by a defective door owned by defendant, pointed out that the plaintiff was not in possession of the property, and could not be charged with knowledge of the defective condition of the door and had no opportunity to prevent the accident.

In the case of *Alaska Steamship Co. v. Pacific Coast Gypsum Co.,* (Wash.) 128 Pac. 654, the very basis of the decision was the question of plaintiff's knowledge of the defective condition of a loading appliance furnished by the defendant. It appeared that plaintiff had knowledge of facts sufficient to put it upon notice of the defect several weeks previous to the accident, by reason of the appliance having operated improperly, although nothing occurred on that day to indicate danger. The lower court held that under the circumstances the plaintiff's knowledge of the defect was conclusively established and granted defendant's motion for a nonsuit. The Supreme Court reversed the ruling on the grounds that while such previous knowledge was very persuasive, still, it was not conclusive.

In the case of *Larkin Company v. Terminal Warehouse Company,* 146 N. Y. S. 380 (affirmed 117 N. W. 1074), a lessee was held liable for the death of an employee caused by the defective construction of an elevator. The lease sought indemnity from the owner, but it was denied on the ground that the lessee ought to have known of the danger from the defective elevator, because, previous to the time in

question, the elevator had been moved from one floor while it was being unloaded on another floor and property had been damaged thereby. Nothing was done thereafter by plaintiff to prevent an accident occurring in a similar manner.

In the case of *Robertson v. Trammell,* (Texas) 83 S. W. 258, 265, it is stated as an express condition of the right to collect indemnity that plaintiff had no notice in time to guard against any damage which might be caused by the act of the party primarily liable, citing *San Antonio Gas Co. v. Singleton,* (Texas) 59 S. W. 920, and *Cooley on Torts,* pp. 166 to 168. The term "notice" must necessarily include "knowledge of facts sufficient to put a party upon notice"; otherwise, as heretofore pointed out, a plaintiff could prove that he had no notice by merely testifying that he closed his eyes to the obvious.

The Pacific Mail Company owed just as great a duty to prevent further damage from the defective clapper-valve, as it would have to any vessel with which the "Ecuador" might have come into collision, or to its shippers where cargo was injured by peril excepted under the bill of lading, or to any tort feasor. The officers of the "Ecuador" at midnight, Sunday, October 14th, had knowledge of more facts sufficient to put them upon notice of the impending damage, and more of an opportunity to have prevented it, than any of the parties charged with that duty in the foregoing cases. They not only had notice of such facts but they actually

knew that water was entering No. 2 hold at a rapid rate and this, coupled with their knowledge of the fact that one clapper-valve in that hold had not been repaired, and their suspicion that the starboard clapper-valve, the only one under water in that hold, had not been repaired, makes their failure to have taken proper action to prevent further damage not only gross negligence, but almost wilfull misconduct.

We think that the District Court would have been inclined to so hold had it not been so convinced that the negligence of the Pacific Mail Company in this particular was a breach only of its obligations to shippers. The District Court entirely overlooked the fact that the Pacific Mail Company owed duties on this occasion to both the shippers and to the Bethlehem Corporation. To the former it owed duties of inspection and soundings, regardless of its knowledge of any impending danger. To the latter it owed duties of inspection, soundings and the use of the bilge pumps immediately when the officers ought to have known, and did know, that water was entering No. 2 hold, and probably, as they suspicioned, through the starboard water valve. Even if the source of the leak were only a suspicion, though based on good reason, it could have been easily confirmed. The fact that the Pacific Mail Company breached duties of inspection and soundings which it owed only to the shipper prior to the voyage, and on the voyage, regardless of unusual circumstances, has no bearing whatever on

the liability of the Pacific Mail Company for its breach of duty to the Bethlehem Corporation to prevent further damage.

CONCLUSION.

There has been an air of mystery, as far as the evidence is concerned, on one point in this case which is essential to the Pacific Mail Company's cause of action. The burden is upon that company to prove that the water which entered the starboard clapper-valve damaged the libelant's cargo wherever it may have been stowed in No. 2 hold, if stowed in that hold at all.

As before noted the water flowed into the vessel through the starboard clapper-valve at the rate of approximately 30 tons per hour, which incidentally the vessel's pumps were amply able to take care of, and in fact could have discharged the water about twice as fast as it flowed in. Assuming that No. 2 hold was dry at 11 o'clock Sunday night when the pump sucked air, as testified by the Pacific Mail Company's witnesses, and making the assumption that the bonnet of the starboard clapper-valve came entirely off of that valve immediately after that time, the greatest amount of water which could possibly have entered through the clapper-valve from 11 o'clock Sunday night to 10 o'clock Monday morning, when the vessel docked at Wilmington, would be 330 tons. At that time, however, approximately 630 tons of water had entered the vessel as

determined between the difference of the drafts of the vessel when she left San Francisco, and when she arrived at Wilmington. (Dupuy, Apos. pp. 538, 539, 555.) Add to this the water pumped out of the vessel between 6 o'clock and 10 o'clock Monday morning at the rate of 60 to 70 tons per hour, say 65 tons per hour, or 260 tons, makes a total of about 890 tons of water which entered the vessel; approximately 330 tons of which was the most possible amount of water which could have entered through the clapper-valve. How the balance of about 560 tons entered the vessel has never been explained by any testimony; although the burden of making a satisfactory explanation was upon the Pacific Mail Company, for the reason that the burden was upon it to prove that the water which entered through the clapper-valve did the damage claimed, and for the further reason that the vessel was at sea, during the time in question, in the exclusive possession of the Pacific Mail Company and its employees.

We say that this element of the Pacific Mail Company's case was left hanging in the air, so to speak, but that is only in so far as the evidence is concerned. Every person who had anything to do with the trial of this case knows perfectly well how that excessive amount of water got into No. 2 hold. There were only two ways which it could have entered; one through the clapper-valve, and the other through the bilge lines. There is testimony in the record that if the new engineer on the "Ecuador"

standing water from midnight Sunday to 4 A. M. Monday, had left a sea valve open, or if the pump in the engine-room bilge were running, as it usually is, and the non-return valves in the bilge lines were defective, or not operating because dirt in the bilges from the cargo became wedged in the valves, water would flow through the bilge lines into No. 2 hold. (Pacific Mail Company's witness, Murray, Apos. pp. 478, 767, 768; Blackett, Apos. p. 775; Young, Apos. p. 780; Bethlehem Corporation's witnesses, Muller, Apos. p. 700; Stoddart, Apos. pp. 715, 716, 718.) The fact that about 890 tons of water flowed into No. 2 hold, and allowing about 330 tons for the greatest amount possible to flow in through the starboard clapper-valve, raises the question as to how the other approximate 560 tons flowed into No. 2 hold. The obvious answer is that, after the pumps were started at 6 o'clock Monday morning, and the water in No. 2 hold increased, nevertheless, some one woke up to the fact that a sea valve was open in the engine-room and shut it off. Then the water in No. 2 hold gradually receded. In any event the question is not answered by having the employees of the Pacific Mail Company take the witness stand and testify that the bilge lines to No. 2 hold were in perfect order after the hold had been flooded.

Independently, however, of the ultimate determination of that question the petition of the Pacific Mail Company must be denied. This is not a case permitting the application of the doctrine that the

Appellate Court will be reluctant to reverse the District Court on a finding of fact, because the District Court heard the witnesses testify and is better able to judge as to the truth of their testimony. The rule that in actions *ex contractu,* such as this, the Pacific Mail Company will be allowed as general damage the cost of putting the unrepaired clapper-valves in a condition as called for by the contract, presents purely a question of law, and it is raised by the petition of the Pacific Mail Company. The rule that in order to collect special damages, such as the damage claimed here, the burden is upon the Pacific Mail Company to prove circumstances showing that the Bethlehem Corporation accepted the liability for those damages, and damages arising from collateral contracts, as a condition of the repair contract. The Pacific Mail Company made no attempt to show any such circumstances, and consequently, the question does not involve the truthfulness of any witness' testimony. The rule that the Pacific Mail Company was required to make reasonable exertions to prevent further damage, raises the question of whether that company knew, or ought to have known, that water was entering No. 2 hold at a rapid rate, at least by midnight Sunday. The answer to that question depends solely upon the facts disclosed by the testimony of the Pacific Mail Company. There is no conflict in the evidence, and there could not have been, for the reason that the Pacific Mail Company's employees were the only ones present on the vessel during the voyage. The

facts disclosed by their own testimony show conclusively that they did have ample knowledge of the impending danger, and their total lack of diligence to prevent it.

There has not been a single reason advanced why this ship repairing company, the Bethlehem Corporation, should have liabilities forced upon it which it did not accept under its repair contract, nor were they contemplated in fixing the consideration named in that contract. Even if it be held that the Bethlehem Corporation occupies the position of an insurer, as defendant in an action for the breach of its repair contract, it ought not to be held liable for damages which could have been easily prevented by the Pacific Mail Company. The law and the equities of the case are squarely opposed to such liabilities, the infliction of which upon the Bethlehem Corporation might be characterized mildly as an injustice.

It is respectfully submitted that the decree of the District Court in this action should be reversed.

Dated, San Francisco,
November 14, 1925.

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